

AN
ESSAY
Francis Hargrave.
ON
USES AND TRUSTS,
AND ON THE
NATURE AND OPERATION
OF
CONVEYANCES AT COMMON LAW,

AND THOSE DERIVING THEIR EFFECT
FROM THE STATUTE OF USES.



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VOL. I.
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TO THE READER.

IN preparing a second Edition of this Essay for the press, the Author has been induced to make considerable alterations in the general Arrangement of his Work, with a view of rendering it more perspicuous and methodical. He has omitted every thing, which he conceived to be superfluous in the former Edition; and he has so compressed the remaining parts of it, that, notwithstanding the introduction of much new matter and the addition of two long precedents, the bulk of the work has not been materially increased.

To each of the Volumes are prefixed a table of its Contents and the names of Cases cited in it.

Lincoln's Inn, Old Buildings,
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CHAP. I.

Of Uses and Trusts before the Statute of 27 Hen. 8. c. 10.

I. **A**N Use is said to be "a trust or confidence, which is not issuing out of land, but as a thing collateral, annexed in privity to the estate, and to the person touching the land; scil. that certain use shall take the profits, and that the terretenant shall make estates according to his directions^a."

SECT. I.

Definition of a use.

This use therefore consisted^b of three parts; the first, that the feoffee would suffer the feoffor to take the profits: the second, that the feoffee upon request of the feoffor, or notice of his will, would execute the estates to the feoffor, or his heirs, or any other by his direction: the third, that if the

^a 1 Co. 121. a. Co. Litt. 272. b.

^b Bac. uses, 10.

SECT. I.

feoffee had been disseised, and so the feoffor disturbed, the feoffee would re-enter, or bring an action to recontinue the possession^c; so that permanency of profits, execution of estates, and defence of the lands, were the three points of trust.

SECT. II.

Distinction between uses and trusts.

II. THOUGH every use, as we perceive by the above definition, did in fact imply a *trust* or *confidence*, yet there were, on the other hand, some kinds of trusts, which did not properly fall within the definition of an use. Therefore to avoid confusion, the word *trust* should only be applied to the latter sort of fiduciary interests: and considering it in this sense only, I shall attempt to shew, how it differed from the use before described.

A use was permanent and general.

The principal distinction between a use and trust consisted in the *permanency* of the one, and in the *transitory* quality of the other. A man made a feoffment *in fee*, by which the possession or seisin was transferred to the feoffee; and a confidence or trust was placed in him to permit the feoffor, or any other person, and his heirs to receive the

^c See Year Book, 2 Ed. 4. 2. b.

profits; and also to make such *legal* estates, as he or they should direct. This confidence was the *use*: for the feoffee had a *permanent* estate *in fee* in the lands, subject to the *use*, or distribution of the profits. The fiduciary or beneficial interest was commensurate to the legal estate. But a *trust* did not always make this regular division of property into use and possession; it rather signified, that the grantor had made a conveyance of his lands, by which he not only transferred the *possession*, but also the *use*, or right to take the profits; reposing a *personal* trust in the grantee, that he would retain both the one and the other, in order to answer some *special* purpose. Thus, if he made a conveyance in trust, or to the intent, that the grantee should make another conveyance to a third person; the trust placed in the grantee was not to pay over the profits, but to dispose of the profits and the possession. This trust was then of a *special and transitory* nature. It was not considered as a *use* before the statute of uses: the courts certainly have not since recognized it as such; for considering the effect of a conveyance of

SECT. II.

Distinction between uses and trusts.

SECT. II.

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this kind under the operation of that statute, the above distinction will appear more accurately. A conveyance is made by feoffment, fine, or recovery, without any consideration, or declaration of the use, but In Trust, that the grantee shall convey to a stranger; the courts say, that the use, which would otherwise for want of a consideration and declaration, result to the grantor, must in this case necessarily vest in the grantee, in order to enable him to perform the trust*. Construing the use to be in the grantee in this case *since* the statute, is only to give that efficacy to the conveyance, which it must have had before the introduction of uses; when the *possession* and the *right to the profits* passed by a conveyance of the *land*.

So likewise, if a man be enfeoffed to the *intent* or in *trust* to be re-enfeoffed, or to the intent to be vouched[†], or to the intent to

* Lane v. Cowper, 166. Vide Bettam's case, Moore, 103. pl. 248. 4 Leon. 22.
 Hummerston's case, Dyer, 8 Bac. uses, 8.

suffer

suffer a recovery^h, none of these *intents*, or *trusts*, are *uses*ⁱ.

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Distinction between uses and trusts.

The trust just described is called by Lord Bacon, "the special trust lawful^k." But there is the special trust *unlawful*, which, he says, was created to the *intent* "to defraud "creditors, or to get men to maintain suits, "or to defeat the tenancy to the præcipe, or

^h 2 Salk. 676.

ⁱ In all these cases a seisin or possession is transferred to the feoffee or grantee by the course of the common law; and as the special trust or intent must necessarily prevent the use from resulting to the feoffor or grantor, the feoffee or grantee must have a complete legal estate without the aid of, and unaffected by, the statute of uses. The notion therefore of Holt and Powell (Gilb. Rep. 17.) that, *after* the performance of the special trust, the *use* will arise from the *feoffor* or *grantor* by

construction of law, appears to be erroneous: for, if it should be once admitted, that the use remained in, or resulted to, the latter, the *legal* estate must be executed in him by the statute; and then the former would be incapable of performing the trust. There seems to be more reason in saying, that, if the feoffee or grantee should neglect to execute the trust, or if the performance of it should become impossible, the use should *then* result to the feoffor or grantor. See Hummerston's case, Dyer 166. 2.

^k Bac. uses, 8.

SECT. II.

Distinction between uses and trusts.

“the statute of mortmain, or the lords of their wardships, or the like; and those are termed frauds, covins, or collusions.”

In another place he adds¹ (speaking of the special trust *lawful*) “and this we call confidence, and the books do call them intents; but where the trust is *not special*, nor *transitory*, but *general* and *permanent*; there it is a *use*: and therefore these three are to be distinguished, and not confounded; the covin, confidence, and use.”

By the statute 50 Edw. 3. c. 6. it appears, that debtors, in order to defeat the claims of their creditors, made secret conveyances upon special trust: upon which account the statute authorized an execution to be taken on the lands. The *trusts* mentioned in this statute were of the *special* nature before described by Bacon. It appears very clearly, that the legislature did not conceive them to be *uses*: that statute made the lands, subject to them, liable to the execution of the creditors of

*See King
on Bacon's
Read 3112.*

¹ pa. 9.

cestuique trust in the hands of the trustee; whereas the lands of *cestuique use* were not liable to executions in the hands of the feoffees, neither was the use itself extendible for the debt of *cestuique use*, as appears by a subsequent statute¹.

SECT. II.

Distinction between uses and trusts.

As a further distinction between uses and trusts, I must observe, that trusts declared upon the estates of tenants *in tail, for life, or years*, were not considered as uses before the statute 27 Hen. 8. but as mere trusts or confidences. Neither tenant in tail², for life³, nor years⁴, could stand seised before that statute, even to an *express* use. It follows, that uses formerly could only have been limited upon a seisin or possession *in fee*.

As uses differed from trusts or confidences in their permanency and extent, so they were more essentially distinguished in their construction and effects. Thus *uses* were assignable by the common law⁵, but *cestuique trust*

¹ 19 Hen. 7. c. 15.

195. Gilb. uses. 11. 205.

² Bro. feof. al. uses. p.³ Bro. feof. al. uses,

40. Year Book 27 Hen.

pl. 40.

8. 10. 2 Co. 78. a. Co.

⁴ See post.

Litt. 19. b. Plowd. 555.

⁵ Gilb. uses, 26. B. N.

2 Roll. ab. 780. Jenk. cent.

C. 75.

SECT. II.

Distinction between uses and trusts.

could not assign his trust even after the statute 1 Richard 3^x. So uses were not only cognizable in the court of chancery, but they were acknowledged by the courts of common law when specially alleged^y; and cestuique use might have been sworn upon an inquest^z; but a simple trust or confidence was in many instances, from its very nature, subject to no jurisdiction whatever; and has been compared to the *jus precarium* of the civilians, as distinguished from their *jus fiduciarium*^a. Thus, as I have before observed, neither a tenant in tail, nor for life, could stand seised to a *use* before the statute of uses; and though it is very evident, that the use or trust declared upon the estate of tenant in tail, &c. was a confidence, which claimed a discharge as conscientious from the terre-tenant, as the use or trust declared upon an estate in fee-simple; yet it is certain, according to the great case in 24 Hen. 8^b, which was determined *by the advice of*

^x Sir Moyle Finch's case, 4 Inst. 85. Dyer, 369. See post.

^y Lord Sande's case. Dyer, 215. Bac. uses, 6, 7.

^z Litt. Sec. 464. Co. Lit. 272, b.

^a Bac. uses, 9.

^b Bro. feof. al uses, pl. 40.

all the judges^c, that cestuique trust had no remedy whatsoever in *chancery* against the feoffee or tenant in tail. So where a corporation was enfeoffed to uses or upon trust, it was held, that the cestuique trust had no remedy by *subpana*^d; because a corporation could not stand seised to a use. Even *since* the statute of uses it has been objected, that a tenant in tail, having the legal estate, could not be a trustee. But that objection was over-ruled^e; and indeed the courts of equity in latter times, deciding upon more liberal principles, have endeavoured to fix the trust upon the *estate*, rather than upon the *person* trusted^f.”

SECT. II.

Distinction between uses and trusts.

III. VARIOUS have been the conjectures concerning the time, when uses and trusts were first introduced into this kingdom. I do not here mean to enquire as to the origin of those

SECT. III.

The introduction of trusts.

^c Year Book 27 Hen. 8. 10. 2 Co. 78. a. See Gilb. 11. 205. 206. *Col-lusion* could not be averred upon particular Estates, as an Estate for life or years. Curson's case. 6 Co. 76. a. Myght's case. *ibid*. 164. a. b.

^d Attorney General, v. Mayor of Coventry. 2 Vern. 399. B. N. C. pl. 60. Gilb. uses. 5.

^e Clowdsley v. Pelham. 1 Vern. 411.

^f See post. ch. 3. sec. 3.

personal

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The introduc-
tion of trusts.

personal trusts, which are better known in our law by the name of *deposits*, or *bailments*; for conjecture can scarce trace a period so remote, in which man, in society, was not sometimes obliged by necessity, or induced by more honourable motives, to entrust another with the object of his care, or the fruits of his industry. (1.) But the practice of conveying real property upon some special trust must have originated in a more refined stage of civilization.

*See Remarks
on this part
in Rowe
on Bac.
Read. 79.*

It appears to me, that *trusts* (according to the distinction before submitted) were introduced into this kingdom prior to *uses*. A *special* trust seems to have been the root, from which *uses* sprang; or as lord Bacon observes,^z a trust was *the way* to a use: and in another place, “the special intent unlawful and covinous was the original of *uses*, though after it induced to the lawful intent general, and special.” In Lord Dacre’s case,^h

(1.) When Tobit went into Media, he left in trust with Gabael, the brother of Gabrias, ten talents of silver in bags, which were sealed up. Gabael, it should seem, gave a writ:

ten acknowledgment for the deposit, and faithfully discharged his trust. See Tob. ch. 1. 5. and 9.

^z Bac. *uses*, 9.

^h Year Book 27 Hen. 8. fol. 8. b.

York

York observes, that a *trust* or *confidence* is necessary between man and man, and that no law prohibits, nor restrains a man from putting a trust or confidence in another. So in Brent's caseⁱ, Manwood observes, that "as long as wills have been, *trust* and *confidence* hath been."

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It would perhaps be impossible to ascertain the exact period, when conveyances of real property upon trust gained a footing in this island. Trusts, it seems, were not unknown to our Saxon ancestors. We are told^k, that after Alfred's death, his son Edward was king of West-Sex and Mercland; but so, that he was king of Mercland *in name only*, the whole possessions remaining to earl Ethelred. "Duo regna Merciorum et Westfaxonum conjunxerat; Merciorum *nomine* tenus, quippe *commendatum* duci Ethelredo, tenens." The estate, which the donees had in this earldom, Mr. Selden concludes, was no less than *inheritance*; though he doubts not, but at the pleasure of the king, divers were made *for life*, and perhaps

ⁱ 2 Leon. 15.^k Selden Tit. Hen. 615. Ed. 1631, cites Wil-

liam of Malm. See also Sir Martin Wright's Ten. 47. note, c.

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tion of trusts.

at *will* only. If this estate were really of inheritance, then the trust declared thereupon was strictly the *use* before described: and that might probably have been the case; for it is well known, that though the Saxons were not altogether unacquainted with the feudal polity, yet the system of feuds with all its rigour was not introduced among us till after the conquest of this island by the Normans. Now the consideration of tenure, so necessary between the donor and donee in all donations strictly feudal, was most unfavourable to every species of trust—a difficulty, which could never have arisen in transfers of the *allodial* property of the Saxons. Hence it has been argued¹ with much propriety, that *uses* of land after the Conquest could not possibly have existed prior to the statute *quia emptores terrarum* 18 Edw. 1. which abolishes the immediate tenure between the feoffor and feoffee. Certain it is, that I find no instances of direct trusts *since the conquest* until the reign of Edw. 3. even in the cases cited as such.

Thus it has been supposed, that trusts were known in the reign of Henry the third.

¹ See Year Book 27 Hen. 8. f. 9. per Pollard.

This

This opinion is occasioned by the statute of Marlbridge^m, which relieves against false and covinous feoffments, made to defraud the chief lords of their wards. The statute, however, does not, I apprehend, warrant this conclusion. For as to the opinion, that the feoffor, in the case of a feoffment to his eldest son, or heir, within age, took the profits for his own use, it is, as Lord Bacon observesⁿ, but a conceit; for though the profits were taken to the use of the *son*, it was still a feoffment within the statute. And as to the second case mentioned by the statute, that certainly alludes to feoffments upon *condition*, and not upon *trust*. Indeed the words of the statute tend to shew, that the feoffor took it out of the power of the feoffee to injure him, by annexing a *penalty* to the non-performance of the agreement. That neither uses nor trusts were known at that time, is very evident from the circumstances attending the succeeding king's reign (Edward the first): for the clergy, who were then endeavouring *arte vel ingenio*, to bring lands into mortmain without licence, were not, it seems, acquainted with the utility of

^m 52 Hen. 3. c. 6.ⁿ Bac. uses, 25.

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trusts. The statute *de religiosis*°, which was principally made to prevent alienations in mortmain, takes no notice of them. Had uses or trusts been known among us at that time, the clergy, who were more conversant in the civil law than the laity, would probably have taken advantage of them.

It has been argued, that trusts were received very early among us, on account of the writ called *causa matrimonii prælocuti*°. Thus, if a woman had given lands in *fee*, or *for life* to a man, to the *intent* that he should marry her, the common law gave her this writ of *causa matrimonii prælocuti* to recover her lands, in case the marriage did not take effect°. So if the woman had given the lands to a stranger, to the intent, that he should reconvey them to her and her intended husband, the same writ was allowed her°. This writ, we must observe, was granted to the woman by the *common law*, which is alone a conclusive reason, that the confidence reposed in the husband or stranger was not considered as a use nor trust: for

° 7 Ed. 1. See Bac. H. 8. 10.
uses, 25.

° F. N. B. 471.

° Vide Year Book 27

° Ibid. 472.

it is a rule, that whenever a remedy is given against uses or trusts, that remedy is afforded by an *express statute*, and not by the *common law*^{*}. It has been further said[†], that trusts were introduced in the reign of Edward the second; but I have found no instance of a trust, which can support that opinion.

Trusts, however, were certainly in frequent practice during the reign of Edward the third. *Brooke*, in a note upon a case, reported in the year book of that monarch's reign[‡], (where feoffees were sued by petition to the king), thinks it worthy of observation, that trusts were known in those days[§]. And though Lord Bacon says[¶], that this case, and the book of 8 *Aff.* (where a fine was levied *in autre droit*) are but implications of no moment; yet the statute 50 Edw. 3. c. 6. clearly proves, that *special trusts* were then in practice. By that statute we find, that people, in order to defraud their creditors, made fraudulent conveyances to their friends upon trust to receive the profits at their dis-

^{*} Poph. 77. Bac. uses, 23.

[†] Brent's case. 2 Leon. ca. 25. per Harpur.

[‡] 44 Ed. 3. 25.

[§] Bro. feof. al uses. 9.

[¶] Bac. uses, 23. 24.

SECT. III.

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posal. The statute runs thus:—"Because
 " that divers people inherit of divers tene-
 " ments, borrowing divers goods in money,
 " or in merchandize, of divers people of this
 " realm, do give their tenements and chat-
 " tels to their friends by *collusion* thereof to
 " have the profits at their will, and after to
 " flee to the franchise of Westminster, St.
 " Martin le Grand, of London, or other such
 " priviledged places, and there do live a
 " great time with an high countenance of
 " other man's goods, and profits of the said
 " tenements and chattels, 'till the said cre-
 " ditors shall be bound to take a small par-
 " cel of their debt, and release the remnant.
 " It is ordained and assented, that if it be
 " found that such gifts be so made by collu-
 " sion, that the said creditors shall have exe-
 " cution of the said tenements, as if no such
 " gifts had been made'."

Conveyances of a similar nature were soon after put in practice. In the beginning of Richard the second's reign, we find that people, in order to defeat the actions of those who had a right of action against them, by being in possession of lands, made secret

^r Vide 2 Rich. 2, c. 3. S. 2.

conveyances,

conveyances, by which means the demandant was ignorant against whom to bring his action. To remedy this mischief a statute was made^y, authorizing the demandant to bring his action against the pernors of the profits.

SECT. III.

The introduction of trusts.

The *trusts* hinted at in this, as well as in the statute 50 Edw. 3. are not *uses*. These trusts are of a *special* and *transitory* nature. They had not the *permanent* quality of a *use*, as I have endeavoured to explain in a former page.

IV. THE earliest mention, which I find, of the word *use*, is in the statute of provisors, 7 Rich. 2. c. 12. It is likely, however, that uses of the permanent nature before described were known in the preceding king's reign; for as in their commencement uses were of a very secret nature (the use being originally created on the estate of the feoffee merely by a *parol* declaration) it is highly probable, that they were not noticed by the legislature, until they had gained some degree of notoriety. In a case before cited^a, Manwood says, "I have seen divers antient

SECT. IV.

Introduction of uses.

^y 1 Rich. 2. c. 9.

^a Brent's case, 2 Leon 15.

SECT. IV.
Introduction of
uses.

“ deeds of uses, and in ancient times you
“ shall not find that any would purchase
“ lands to himself alone, but had two or
“ three joint feoffees with him, and he who
“ was first named in the charter of feoff-
“ ment, was *cestuique use*, although that no
“ use was *declared* to him upon the livery ;
“ and so it was known by the *occupation* of
“ the lands. And the reason, why no men-
“ tion is made in our antient books of Uses,
“ is, because, men were then of better con-
“ sciences than now they are ; so as the feof-
“ fees did not give occasion to their feoffors
“ to bring *subpanas* to compel them to per-
“ form the trusts reposed in them.”

The secret manner, in which uses were at first declared, and the difficulty of legal proof in such cases, left the performance of them almost entirely to the honour and conscience of the feoffees. To remedy an inconvenience of this nature, it has been said, that John Waltham, who was bishop of Salisbury and chancellor to king Richard the 2nd, by a strained interpretation of the statute of West. 2. devised the writ of *subpana*, returnable in the court of chancery only ^b.

^b 3 Black. Com. 52.

V. THE idea of a use afforded the clergy an excellent opportunity of avoiding the statutes of mortmain; for though they could not buy lands in their own names, yet they might evade the statutes by obtaining grants, not directly to, but to the *use* of, their religious houses. But the legislature interfered, and by a statute made 15 Rich. 2. c. 5. it was enacted, that the lands so purchased to uses should be amortized by licence from the crown, or sold to private persons; and that uses should be subject for the future to the statutes of mortmain, and be forfeitable like the lands.

SECT. V.

History of uses
to the reign of
Rich. 3.

The uses mentioned in the above statute, and that of provisors, were of a *covinous*, though *permanent* nature. But though they originated in covin, yet their continuance after these statutes, and the favourable construction, which they have at times received, proceeded from very equitable motives: and upon that account an use was not afterwards considered *covinous*, or *collusive*^a.

^a Bac. uses. 8.

SECT. V.

History of uses
to the reign of
Rich. 3.

It must be remembered, that the disputes between the houses of York and Lancaster originated in the reign of Richard the second. Their unfortunate quarrels had deluged the kingdom in blood; and when inducements of safety, or rage of party, influenced men to embrace one side or the other, still an anxiety of retaining their fortunes in their own families led them to seek means of preserving their estates from forfeitures, before they ventured to enter into these civil broils. To effectuate these wishes, nothing could happen more opportunely than the notion of giving their estates to one indifferent person, to the use of the persons, who were intended to be benefited by the trust. Now there appeared two ways of accomplishing this end. The most plain and simple was that of giving or conveying lands, in the *lifetime* of the grantor, to such uses as were directed in the deed, or by parol signification: whilst the other served to give a power over *uses*, which was not suffered by the common law over the *lands*—that of *devising*: for it was thought, that if a man made a feoffment to such uses, as he should by his will appoint, though this could not operate as a devise of the lands, yet certainly it could as an appointment

pointment of the use; which appointment would be binding in conscience. As the legal estate was vested in the feoffees by either of these dispositions, the lands were exempted from forfeiture. The causes then, which induced men to *continue* uses at this period, were extremely different from those of their production. Their origin was occasioned by fraud; their continuance proceeded from that anxious sensation, which every honest man possesses. Here then was an ample field for the court, which is particularly instituted to observe the consciences of men, to exert its influence. It had an opportunity of extending that equitable protection, which the *extremum jus* of the common law denied.

SECT. V.
History of uses
to the reign of
Rich. 3.

From considerations of the above nature, most of the lands in this kingdom during the civil commotions, which attended the troublesome reigns of Rich. 2. and Henry 4, were conveyed to uses. A practice so general could not escape the notice of the legislature; and therefore we find, that in some general acts as in 21 R. 2. c. 3. and in some particular ones, as in the case of the duke

SECT. V.
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of Northumberland^b, forfeitures for treason were extended not only to the lands, of which the person attainted was himself seised, but to those whereof he was seised as *cestuique use*.

During the reigns of Henry the fourth, Henry the fifth, and Henry the sixth, I find only three statutes relating to *trusts*. The statutes of 4 Hen. 4. c. 7. and 11 Hen. 6. c. 3. were enacted merely to confirm and enlarge the 1 Rich. 2. c. 9. before mentioned. But the 5th chap. of the 11 Hen. 6. shews, that the knowledge of *trusts* had taught men a subtle manner of committing injuries with impunity, contrary to the established laws of the country. It seems, that tenants for lives or years, who were subject to actions of waste by the reversioner, upon their commission of it, had taken advantage of the doctrine of trusts, in order to escape the punishment, which otherwise ought to have been inflicted upon them by the person, who claimed the reversion and freehold. To this intent they conveyed their estates to their friends in trust for themselves,

^b See the Year Book, 11 Hen. 4. 52.

and afterwards committed waste upon the lands at their pleasure; they still continuing to occupy the premises, and to take the profits to their own use: for the reversioner being ignorant of the *legal* owner of the lands, did not know against whom to bring his action. But the legislature soon put a stop to this invention. By the fifth chapter of Henry 6, "it is ordained and established, " That they in the reversion in such case " may have and maintain a writ of waste " against the said tenants for term of life, of " another's life, or for years, and so recover " against them the place wasted, and their " treble damages for the waste by them " done, as they ought to have done for the " waste committed by them before the said " grant and lease of the estate." The conveyances, here alluded to, by tenants for life or years, were more properly conveyances upon *trust*, than to *uses*, as I have already explained.

During the reigns of Henry 4 and his successor, I can find no case^c expressly re-

^c Sed vide Bro. feoff. al. uses pl. 45.

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to the reign of
R. ch. 3.

*1. R. 2. c.
9. 4. H. 4.
c. 7. H. 6.
c. 3. 1. H. 7.
c. 1. H. 8.
to H. 8.
H. 8. 1. c. 1.
123. in
Chudleigh
case.*

lating to uses; but there are some respecting conveyances upon the collusive trusts mentioned in the statutes of pernors of profits^d. In the reign of Henry 6, some few cases occur, which shew the very imperfect state of uses at that period^e. About the time of Edward 4, a more regular system was adopted by the courts of equity^f; and in the fourth year of that king's reign the great point seems to have been fully settled, that *cestuique use* could obtain no relief in the courts of common law, but must rely merely upon the equitable jurisdiction of the court of Chancery^g; a rule which has been strictly adhered to, not only prior to the statute of uses, but since the introduction of modern trusts^h. But even in this reign the principles of equity were so little understood, that it was determined, that the sub-

^d See the Year Books,
9 Hen. 4. 8. 12 Hen.
4. 21. 1 Hen. 5. 4.

^e Year Book, 33 Hen.
6. 15. 37 Hen. 6. 35.
Vide Bro. feof. al uses pl.
49.

^f Vide Year Book, 5
Ed. 4. 7. 8. 7 Ed. 4.

14. 18 Ed. 4. 11. 7
Ed. 4. 29. 17.

^g Year Book, 4 Ed.
4. 8.

^h Vide Doe v. Staples,
2 Term. Rep. 684.
Goodtitle v. Jones, 7
Term. Rep. 47.

pæna did not extend to the *heir* of the feoffee, who was in by law; but relief in such case could only be had by his bill in parliament¹.

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From the 11 Henry 6. to the reign of Richard 3. (which includes a space of fifty years) the statute book is totally silent upon the subject of uses. From this circumstance Lord Bacon concludes, that uses were unquestionably most favoured about that time. Indeed there is great reason to believe, that that actually was the case; especially if we consider the statute made in the first year of Richard the third's reign.

VI. IN order to explain the causes of enacting that statute, we must necessarily anticipate a few observations, which were intended for another place.

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Causes of enact-
ing the stat. of
1 Rich. 3. c. 2.

About this time the power of the feoffees was much more unrestrained, and consequently more dangerous to the cestuique use, than it stood immediately preceding the sta-

¹ Year Book, 8 Ed. 4. this was soon remedied.
6. 22 Ed. 4. 6. But See Keilw. 42. b.

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Causes of enact-
ing the stat. of
1 Rich. 3. c. 1.

tute 27 Hen. 8. c. 10. The feoffees not only possessed the whole estate in the land ^a, but also, like absolute owners, had the ability to give or dispose of it, as they pleased. In short they were reckoned in most cases as complete proprietors of the land (as will be shewn hereafter) with this difference only, that if they had granted the lands with notice of the former uses (though there had been a valuable consideration), or without notice and without a valuable consideration ^b, in either case the second feoffees would have been seised to the former uses. And moreover it seems, that the cestuique use could always have compelled the feoffee or teretenant to make such conveyances as he should direct ^c. But this he was only compellable to do by subpoena out of chancery ^d. Indeed the *cestuique use* might have aliened, or transferred his *use*; that is to say, he might have transferred the equitable right to the profits of the lands ^e. But the alienee or purchaser was in the same

^a 1 Co. 132. a.

^b Plowd. 351.

^c Vide Bro. tit. feof.
pl. 14. See Sec. 2.

^d 1 Co. 121. b. 33

Hen. 6 16.

^e Bac. uses, 16. Vide
ante. Sec. 2.

precarious

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ing the stat. of
1 Rich. 3. c. 1.

precarious situation with respect to the feoffees, as the cestuique use himself was; for as to the possession of the land, *that* he could not meddle with nor dispose of, unless by suit in Chancery, or by permission of the feoffees; and even if the feoffees suffered him to be in possession, and being so, he made a feoffment, this feoffment was supposed not to pass the lawful possession without the concurrence of the first feoffees. Whereupon the first feoffees often entered upon the second, and thereby caused the parties to seek relief in equity, and occasioned the utmost vexation^f. To remedy, therefore, these inconveniences, and to give a better security to *bona fide* purchasers (and not, as it is generally believed, to afford greater advantages to the cestuique use than he possessed before) the statute of Richard 3. c. 1. was enacted. The statute recites, "Because, that by privy and unknown feoffments, great unsurety, trouble, costs, and grievous vexations daily grow betwixt the king's subjects, insomuch that no man that buyeth any lands, tenements, rents, services, or other hereditaments,

^f Gilb. uses, 27.

"nor

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ing the stat. of
1 Rich. 3. c. 1.

“ nor women which have jointures or dowers
 “ in any lands, tenements, or other here-
 “ ditaments, nor the last will of men to be
 “ performed, nor leases for term of life or
 “ years, nor annuities granted to any per-
 “ son or persons, for their services for term
 “ of their lives, or otherwise, be in perfect
 “ surety, nor without great trouble and
 “ doubt of the same, by reason of such pri-
 “ vie and secret feoffments : for the remedy
 “ whereof it is ordained, established, and
 “ enacted, by the advice of the Lords
 “ spiritual and temporal, and the com-
 “ mons in this present parliament as-
 “ sembled, and by authority of the same,
 “ That every estate, feoffment, gift, re-
 “ lease, grant, leases and confirmations of
 “ lands, tenements, rents, services, or he-
 “ reditaments, made or had, or hereafter
 “ to be made or had, by any person or per-
 “ sons being of full age, of whole mind,
 “ at large, and not in duress, to any person
 “ or persons, and all recoveries and execu-
 “ tions had and made, should be good and
 “ effectual to him to whom it is so made,
 “ had, or given, and to all others to his use,
 “ against the seller, feoffor, donor, or granter
 “ of the same, and against the sellers, feof-
 “ fors,

“fors, donors, or granters, and his and
 “their heirs, claiming the same only
 “as heir or heirs to the same sellers,
 “feoffors, donors, or granters, and every of
 “them, and against all others having or
 “claiming any title or interest in the same,
 “only to the use of the same seller, feoffor,
 “donor, or grantor, or sellers, donors, or
 “granters, or his or their said heirs, at the
 “time of the bargain, sale, covenant, gift,
 “or grant made: saving to every person or
 “persons such right, title, action, or inte-
 “rest, by reason of any gift in tail thereof
 “made, as they ought to have had if this act
 “had not been made.”

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 Causes of enact-
 ing the stat. of
 1 Rich. 3. c. 1.

VII. THIS statute was evidently intend-
 ed for the benefit of purchasers, by giving
 the cestuique use an alienable power over
 the possession, as well as the use. But the
 intention of the legislature was entirely frus-
 trated; for the statute did not take away
 from the feoffees the power of alienation;
 and consequently if they aliened the land for
 a valuable consideration, and *without* notice,
 previously to any disposition made by cestuique
 use pursuant to the statute, such alienation
 disabled cestuique use from exercising the
 power;

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power, which the statute meant to afford him. Besides this inconvenience, there was a still greater one produced by the statute; for it often occasioned a kind of double-handed proceeding, or fraud, both in the feoffees and cestuique use. The feoffees had a power over the possession by the common law, and the cestuique use by the statute. They therefore often colluded, and by making secret and different feoffments, they purposely defeated each others alienation, with a view to deceive purchasers.

But though the spirit of the statute was overturned in this respect, yet new cases were unavoidably produced, which required particular expositions. I shall therefore, by way of digression from the historical account of uses, make a few observations concerning this statute; and in the first place I shall notice the effect, which it produced upon the *alienation* of cestuique use.

Of the alienation
of the cestuique use.

(1.) It has been a question of some importance, and perhaps never decided, whether any or what part of the estate of the feoffees continued in them after the feoffment of or alienation by the cestuique use.

This

This question, however, was governed by circumstances; that is to say, in one case, I conceive, the estate and right of entry of the feoffees were entirely divested by the conveyance of cestuique use; whilst in another, at least a *right of entry* might have been said to continue in them notwithstanding such alienation.

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As an instance of the former case, if cestuique use in *fee* had made a feoffment in *fee*, according to the statute 1 Richard 3. c. 1. it seems, that the whole interest of the feoffees was thereby conveyed. So if there had been cestuique use in *fee*, and he had made a feoffment in *fee* upon condition of re-entry, and the condition was afterwards broken, and the cestuique use had entered; the estate of the feoffees was not restored by such entry ^a.

In fee.

But though the law stood thus with respect to the alienation of *cestuique use* in *fee* by the statute of 1 Rich. 3. yet we must make a distinction, when cestuique use had

Of cestuique use
in tail, &c.

^a 2 Hen. 7. 25. Bro. tit. feof. al. uf. pl. 18. Co. Litt. 103. a.

only

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only a particular estate in the lands, as an estate for life or in tail, with a remainder over. For, I apprehend, that after the feoffment and death of cestuique use, the feoffees had a right to enter to revive the former uses; which clearly shews, that either the remaining part of the use, after the determination of the particular estate of cestuique use, continued in them, or if it were entirely out of them, that they had a right to re-vest it after the demise of cestuique use by their entry. This distinction however was doubted by some, who thought, that the feoffees would have had no title of entry after such a feoffment or other alienation.

The cases cited to authorize this last doctrine are chiefly taken from Dyer's Reports.

Thus, in a case^b in the seventh year of Edward the Sixth's reign, where one Davis, being seised in fee, enfeoffed J. L. and others in fee, in the 19th year of Henry the 8th, to the use of his wife for life, remainder to his brother in tail, remainder to B. H. in

^b Davis's Case, Dyer 88. b. 89. a.

tail,

tail, remainder to the right heirs of the feoffor. Afterwards, in 24th Henry 8. Davis and his wife levied a fine with proclamations to Sir H. W. and others in fee, to the use of Sir H. W. and his heirs in fee. The brother, the first in remainder, joined in this fine. Sir T. W. son and heir of Sir H. W. bargained and sold the lands to the King in fee. After this the brother died, and then the wife died. J. L. the surviving feoffee, brought his petition, and this matter was found by the verdict. In arrest of judgment it was alleged on the part of the King, that the petition did not lie for the feoffee, because the fee-simple of the use was lawfully conveyed to Sir H. W.; and therefore J. L. the feoffee, could not enter to revive the use; because he could not be seised of the fee-simple in the same manner, as he was before the alienation. This case does not appear to have been determined; and therefore Dyer adds, "et ideo quære inde."

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However, in a case sent out of chancery for the opinion of the judges^a, they de-

^a Baskerville's case. Dyer 329. b. 330. a. Vide Dy. 58. a. Zouche's case.

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cidedly were in favour of this opinion. It was thus: there was cestuique use in tail, remainder over in tail, remainder to the first cestuique use (in tail) in fee. Cestuique use in tail before the 27th H. 8, made a feoffment to the use of himself for life, remainder to his first son (being heir in tail) and his wife for their lives, remainder to the heirs of their bodies, remainder to the use of the right heirs of the feoffor. The feoffor died, and the first feoffees entered to revive the former uses in tail. Dyer and Manwood were both of opinion, that the entry of the feoffees was unlawful; for that the fee-simple in the use was lawfully transferred, and the right of the feoffees bound by the statute of 1 Rich. 3d. Therefore, by their entry, the feoffees could not have their former estate; that is to say, the fee-simple. This opinion was sent into chancery by those judges.

On the other hand, it was expressly stated, in the beginning of the reign of Henry the Seventh^e, that if cestuique use *in tail*, made a *feoffment* in fee, the feoffees might enter

* Bro. tit. feof. al. uses. pl. 22. 4 Hen. 7. 18.

after

after the death of cestuique use in tail for the purpose of revesting the former uses; and that a feoffment by cestuique use *for life* operated only upon his estate for life; and consequently did not create a forfeiture. This opinion, it seems, was adopted in the reign of Henry the eighth: for Brooke^d tells us, that there was then no occasion for entry or claim, within the five years, to avoid a fine levied by cestuique use *for life* with proclamations; such fine not working a forfeiture. The rule, that neither a feoffment nor fine by cestuique use for life amounted to a forfeiture of his estate, must have been established upon one of these grounds;—that by the feoffment or fine the use and legal estate passed to the grantee *during the feoffor's life*, whilst the remainder continued in the first feoffees; or, that by the fine or feoffment, a base fee passed to the grantee, determinable upon the death of cestuique use by the entry of the feoffees.

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^d Bro. tit. fines. pl. 107. Vide also Dyer 57. b. p. 1. as to a lease by cestuique use for life.

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Delamere's case^f was, in substance, thus :
R. D. in the 13th Hen. 8. enfeoffed T. S.
and others in fee to the use of himself and
his wife, and the heirs of their two bodies ;
and in default of such issue, remainder to
R. D. in tail ; remainders over. R. D. in
the 26th H. 8. enfeoffed W. D. in fee ;
afterwards R. D. died, and the heir of the
surviving feoffee entered to revive the an-
tient uses ; and, upon solemn argument, it
was held, that the entry of the feoffees was
lawful. It was said in this case, that by
the feoffment of R. D. the fee-simple in
the lands passed ; but that after the death
of the feoffor the feoffees might re-enter to
revive the antient uses ; but that, although
this right of entry remained in the feoffees,
yet until their regrefs the fee-simple was out
of them. This case was considered as esta-
blishing a principle different from the deter-
mination in the case cited from Dyer ; and
it was observed, that this was determined
upon solemn argument, but that from Dyer
was only the opinion of the judges, with-
out any argument^g.

^f Plowd. 348 to 353. 1 Co. 128.

^g 1 Co. 128. b. 129. a.

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The case from Dyer appears irreconcilable to the first case cited from Brooke's Abridgment; but perhaps it is not altogether inconsistent with Delamere's case. The statute of Richard renders the feoffment of cestuique use valid against all claiming any title or interest in the lands only to the use of the feoffor *or his heirs*. Now when the feoffor in the latter case died, the feoffees did not claim to the use of the heirs, but of the wife, of the feoffor; in which case they were neither restrained by the statute, nor the common law. Whereas in the case from Dyer, the first feoffees certainly did claim to the use of the *heir* in tail of cestuique use. The only doubt appears to have been, whether the words of the statute, "claiming the same *only as heirs* of the feoffor, &c." should extend to the heirs *special*, as well as *general*^h.

If the case from Dyer be correctⁱ, a feoffment by cestuique use *in tail*, after the statute of Richard the first, had the same operation in barring the claims of the issue,

^h See B. N. C. 147. ⁱ Dyer 329.

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as a fine would have had^b. I say, as a *fine* would have had, because, though it was at first doubted, whether it would have had that effect, yet it was settled^c, that a fine properly levied would completely bar the issue in tail of cestuique use, and also the entry of the feoffees, whilst they claimed to *the use of the issue*. But according to the doctrine in Delamere's case, neither the feoffment nor the fine would have barred any remainder expectant on the determination of the estate tail; for whenever the intail ceased, the feoffees would have had a right to enter to revive the antient uses; in that case they would not have claimed to the use of the feoffor, or his heirs, but to the use of a stranger. I must here observe, that Gilbert^d, in his treatise on the law of uses and trusts, seems to have been in an error, when he asserts, that a recovery suffered by a cestuique use in trust, did not, after the statute 1 Richard 3, bind the issue in tail: for notwithstanding the doubt entertained in 30 Hen. 8^e, it is

^b Sed contra Year Book, 19 Hen. 8. 13. 4 Hen. 7. 18.

^c B. N. C. 146. Year Book, 27 Hen. 8. 20.

^d Gilb. Uses, 32.

^e Vide Bro. N. C. 147.

certain

certain from the words of, and the subsequent construction upon, the statute, that the recovery bound the issue claiming as heirs *only* of the grantor or recoverer^f.

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(2.) When the statute 1 Rich. 3. passed, a use, as Lord Bacon observes^g, appeared "in his likeness; for there is not a word spoken "of *taking the profits* to describe a use by, "but of *claiming to a use*." The statute does not even mention the words *trust* and *confidence*, which are so particularly expressed in the statute 27 Hen. 8. c. 10. It is evident, that the statute extended merely to uses declared upon a *seisin* or *legal estate in fee*^h: and that a trust or confidence declared upon the seisin or estate of a tenant in *tail*, for *life*, or *years*, was not such a fiduciary interest, as to come within the meaning of the *use* described by the statute. This construction was adopted for reasons before

Of trusts and
interests not
within the sta-
tute 1 Rich. 3.

^f Vide Bassett and Morgan v. Manxel. Plowd. 4. Vin. ab. tit. uses, W. a. pl. 1. in notis.

^g Bac. uses, 27.

^h See 1 Co. 128. a. b. Year Book, 19 Hen. 8. 13. 4 Hen. 7. 18. Bassett v. Manxel, Plowd. 3.

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explained, viz. because the courts of equity in those days, still tinged with the prejudices of the common law, had conceived, that the estates of tenant in tail, for life, and years, were, from their very nature, incapable of being conveyed to a use. (.)

Estates tail.

For as to the estate or seisin of a tenant in tail, it was held, that no use could be declared thereupon; 1st, because the tenure of itself created a valuable consideration; 2d, because the statute *de donis* had appropriated and fixed the estate tail to the donee and the heirs of his body, so that neither he, nor they, could execute the use¹. I must here observe, that the exception in 1 Rich. 3. was held to extend only to tenant in tail of the legal estate, and not to cestuique use tenant in tail².

Estates for life.

As to the estate or seisin of a tenant for life, it was said, that the consideration of tenure was a sufficient declaration of the use to

¹ Jenk. cent. 5. Ca. 1.
See the cases before cited.

² B. N. C. 146.

the tenant, and that he could not stand
seised to any other use.

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Estates for years.

The same observation is applicable to the
estate of a lessee for years. But it is of
real consequence, that this point should be
understood.

Therefore to apply this antiquated learn-
ing to modern practice, and to put a pro-
bable case: Suppose A. possessed of the legal
and absolute interest of 1000 years, and
that he assigns over his term to B. in trust
for himself, and then makes a feoffment in
fee. This is a practice frequently adopted
for the purpose of acquiring a freehold by
disseisin, and at the same time of providing
against any forfeiture of the term by the entry
of the remainder man. But the intention of
the parties would be entirely frustrated, sup-
posing the trust declared upon the term of
1000 years to be a *use* within the statute of
1 Rich. 3. In such case the *legal* estate
of B. (according to Delamere's case, and the
very words of the statute) must pass by the

¹ Bro. feof. al. uses, pl. 40. B. N. C. pl. 60.

feoffment

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feoffment of A. Now that feoffment must either create a freehold by disseisin, or it must operate merely as to the extent of the term; the latter case would not answer the purpose; and in the former, A. would be exposed to the very forfeiture, which he intended to prevent. So it is usual for a tenant for life, who is about to make or concur in a conveyance, which may expose him to the forfeiture of his life estate, to make a previous demise of the lands to a trustee for 99 years (if he shall so long live) in trust for himself. It is therefore, as I observed before, of real consequence, that it should be ascertained, whether the trust of a term of years *can in any case* be considered as coming within the statute of Rich. 3.

I conceive, that upon an attentive perusal of the authorities upon the subject, we may collect these points. First, that the statute of Richard was intended only to extend to *uses* properly so called; or in other words, it has never been construed so as to comprize such fiduciary interests, as at the time of the act, were not cognizable by the court of chancery; and secondly, That

a termor

a termor or lessee for years could not at that time stand seised either to an *implied* or *express* use; or, to explain myself more clearly, that the subpoena was not issuable against him for the purpose of compelling him to perform the use declared upon his lease; because it was supposed, that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with, and repugnant to, the nature of a use, declared to any other person.

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I mention this rule as the construction of the court of chancery, before the *statute of uses*, when, it is well known, that that court still favoured the conclusions of the common law. The use or trust declared upon the estate of a lessee for years was in fact the *jus precarium* before alluded to; the cestuique trust having nothing to depend upon, but the honour and conscience of his trustee. It was not till after the statute of uses, that the court of chancery, acting upon more liberal principles, and being under the necessity of once more watching over the consciences of men, found an opportunity of supporting that as a *trust*, which
the

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the courts of common law rejected as an *use*, and of adopting a system in respect to the former, which is attended with all the benefits and without any of the inconveniences of the latter. On the other hand, the courts of equity have never considered any species of fiduciary interests as *uses*, which were not considered as such before the statute 27 Hen. 8. Such a construction would not have answered the purposes of equity. Thus, for instance, no *use*, as I have just mentioned, could be declared upon a lease for years, and it was not within the statute 27 Hen. 8. ; yet the court of chancery conceived, that the confidence reposed in the lessee was as much to be observed in equity, as any other kind of *use* or trust. Now how was this confidence to be supported? Certainly not as a *use*, but as a *trust*, which the court of chancery could fashion according to the more modern notions of equity. If it had been supported as a *use*, then it must have been adopted with all its deformities. But it is very certain, that the *trust*, declared upon a term of years, differs in most essential points, from what a *use* formerly was.

Thus

Thus all the questions concerning who were, or were not, capable of being seised to a use are avoided in the case of modern trusts; as the courts of equity fasten the trust upon the *estate*, and not the *person*. So there could be no *implied use* upon a lease for years^m, but trusts by implication are perhaps more frequent upon terms for years, than any other kind of propertyⁿ. The wide difference in their construction between a modern *trust* of a term of years, and a *use* before the statute of uses, forms, in my opinion, a very conclusive reason in favour of the positions before submitted, viz. that the former never has been, nor can be considered, as the use described by the statute 1 Rich. 3.

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I shall now add the several authorities, which I find in the books, confirming the points in question; in which it will be perceived, that though the court of chancery, soon after the death of Hen. 8., had in some measure overcome its scruples, by allowing

^m This is a point universally acceded to by a. and Perk. f. 536. Dyer 10.

writers on the subject. * See also many other instances. Post. ch. 3.

the

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the *subpœna* to issue against the lessee for years, being a trustee; yet it was not till after the reign of Elizabeth, that the trusts declared upon a term were held even assignable in equity; it being at the same time recollected, that a *use* was always transferable in chancery.

I find it expressly stated by Brooke^x, and Crompton^y, that a lease for years upon trust was not within the statute of 1 Rich. 3.

The lord chancellor, in easter term 22 Eliz.^z put this question to the judges: A, being possessed of a lease for a term of years, granted all his *estate* and *interest* to B. and C. and their assigns, to the use of the said A. and his wife, for the term of their lives, and of the longer liver of them; and afterwards the said A. gave to a stranger such interest as he then had in the said lands in lease, and died; whether this grant made by A. gave all the term of B. and C. or not? And it was answered by all the justices and the

^x Bro. seoff. al uses, pl. 40. 60.

^y Crompt. on Courts, 66. a.

^z Dyer, 369. a.

chief

chief baron, that the gift or grant of him, in trust for whom the term was granted, was void and out of the *statutes of cestuique use*: and in a note by the editor it is said, “and 1 R. (c. 1.) and 27 Hen. 8.” for which he cites Ridley’s case. The observation, which Crompton (who wrote in the latter part of Elizabeth’s reign) makes upon the case from Dyer, is much to our purpose; “Mes
 “done d’un terme pur ans al use est bon
 “matter *a c’est jour* in conscience, et que
 “il avera *subpœna* in le chauncerie.” This remark clearly proves, that cestuique trust of a term was not *formerly* entitled to the subpœna.

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 and effect of the
 stat. 1 Rich. 3.

In the case of Sir Moyle Finche^b it was resolved by all the justices, “that a *trust*
 “could not *be assigned*, because it was a mat-
 “ter in privity, and was in nature of a chose
 “in action, for *cestuique trust* had *no power*
 “of the land, but only to seek remedy by
 “*subpœna*, and not like to *cestuique use*, for
 “thereof there should be *possessio fratris*, and

^a Crompton, 66. a.
 See also Rooke v. Staples,
 Cary’s rep. 76. 21 & 22
 Eliz. where there was a

decree in favour of a ces-
 tuique trust of a term.

^b 4 Inst. 85.

“ he

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“ he should be sworn on juries in respect of
“ the use, and he had power over the land
“ by the statute of 1 Rich. 3.”—Here then
the very distinction before contended for is
acknowledged by all the judges, and after-
wards by the chancellor; and it is observ-
able, that sir Edward Coke, as an instance of
the *trust* just described, actually cites the above
mentioned case from Dyer.

Gilbert, in his law of uses*, is of opinion,
that if A. had assigned over the *land* itself in
the case taken from Dyer, it would have
been good by 1 R. 3.; but the words he
used were not sufficient to pass the land itself,
for he had no *interest* therein. But of this
notion it is sufficient to observe, that it is
not only directly contrary to the authorities
before quoted, and to the reason of the thing,
but would, if adopted, subvert the practice
of the most eminent conveyancers. Besides,
there is an evident absurdity in the distinc-
tion between the grant of the *land* itself and
of an *interest* therein; for it is clear, that
the very statute 1 R. 3. gave *cestuique use*
an *interest* in the land; and therefore if

* Gilb. uses, 199.

cestuique

cestuique trust of a term had been considered as a cestuique use under that statute, the grant of his *interest* would have been as operative, as the grant of the *land* itself, for the purpose of passing the legal estate in the term^d.

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In a late case^e where there was an outstanding satisfied term of years (and consequently attendant upon the inheritance), it was argued, that this term was within the stat. Ric. 3.; and that the legal interest therein passed by a conveyance of the inheritance. But it was unanimously held, that the statute Ric. 3. was not applicable to that case.

(3.) Perkins says^f, "If cestuique use be of a reversion, he may grant the same as well as if he were in possession, and that by the statute of Richard 3d, made in the

Of the alienation of cestuique use in remainder, &c.

^d Vide Co. Litt. 345.
^b 3 Co. 24. a.

^e Goodtitle dem. Jones v. Jones, 7 Term rep. 47.

^f Perk. f. 98. Perkins is also wrong (as the authorities before cited

prove), when he asserts, that tenant in tail, for life, or for years, could stand seised to an express use before the statute 27 Hen. 8. See Perk. 537.

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stat. 1 Rich. 3.

"first year of his reign, *cap. 1.*" But Perkins, in this instance, cites no authority in support of his assertion, and he is clearly wrong. His position is directly contradicted by the determination in Delamer's case^z, in which it was decided, that the statute only intended to give the *present* possessor of the use a power of alienation, and did not extend to those in remainder or reversion^h. Upon the same principle, the statute did not extend to cestuique use, who had only a naked right to the use, the establishment of which depended upon the entry of his feoffeesⁱ. But it was holden, that if the feoffees to uses had been disseised, and cestuique use had released to the disseisor; or if the disseisor had enfeoffed cestuique use, who had enfeoffed a stranger: in either case, the entry of the feoffees was completely barred^k.

Of leases by cestuique use in fee.

(4.) Cestuique use, by this statute, might have made a lease for years, rendering rent, for which he might have brought his action,

^z Plowd. 348. 350.
¹ Co. 128. a. b.

^h Bro. feof. al. uses,
pl. 44. B.N. C. 75.

ⁱ Plowd. 351. Gilb.
uses, 27, 28.

^k Plowd. 351, 352.

but

but could not have avowed¹: and it was determined, that a reservation of rent by cestuique use, would have carried it to the heir, though not particularly named for that purpose^m. However, though cestuique use was enabled to make a lease for life or years, yet the reversion was still in the feoffees, who might have brought an action notwithstanding the want of privityⁿ.

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Stat. 1 Rich. 3.

(5.) Cestuique use could not *devise* the *lands* by the equity of 1 Richard 3°. This construction was adopted for obvious reasons. Though the statute established the legal conveyances of cestuique use, yet neither the words, nor the equity of it, could have been adjudged to countenance his tortious acts: for lands before the statute 32 Hen. 8. were not deviseable.

Of devises by
cestuique use.

(6.) It was also said, that if a lord, or a grantee of a rent-charge, had been also cestuique use of the *land*, and after the statute of 1 R. 3. cestuique use had made a feoffment in fee; though the land passed from

Where cestuique
use was also the
lord or grantee
of a rent charge.

¹ 27 Hen. 8. 13. Bro.
feof. al. uses, pl. 6.

^m Ibid. pl. 18.

ⁿ Year Book, 5 Hen. 7.
5. b.

^o Dy. 74. a. 143. a.

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the feoffees, and his feoffment was warranted by the statute, yet the seignory or rent-charge was extinguished^o. And further, it was determined, that cestuique use was bound in a statute merchant, statute staple, and by elegit, by the words of the statute 1 Rich. 3^p.

Of the nature of
the feoffment
introduced by
the statute.

(7.) This statute of Rich. 3. was said to have introduced a new species of feoffments, which differed from the feoffment by the common law in many respects. The difference is explained in the lord Sheffield's case^q: it is there said, "Feoffments are the
" antient conveyances of the land; but feoff-
" ments, according to the 1st Rich. 3d, are
" upstarts, and have not had continuance
" above *one hundred and fifty* years. In case
" of feoffments at common law, the feoffor
" ought to be seised of the lands at the time
" of the feoffment; but if a feoffment be
" according to the statute 1st Rich. 3d. in
" such case the feoffor needeth not be in
" possession. Feoffments at the common

^o Co. Litt. 52. a. Gilb.
uses, 31.

25.

^p Year Book, 7 Hen. 7.
6. Bro. feof. al. uses, pl.

^q Godb. 318. 2 Roll.
Rep. 333.

" law

" law give away both the estates and rights; SECT. VII.
 " but feoffments by the statute 1st Rich. 3d,
 " give the estates, but not the rights. In The operation and effect of the
 " case of feoffment at the common law, the stat. 1 Rich. 3.
 " feoffee is in the *per*, viz. by the feoffor;
 " but in case of feoffments by the statute of
 " 1st Rich. 3d. the feoffees are in the *post*,
 " viz. by the first feoffees. 14 Hen. 8. 10.
 " Brudnell says, *that a feoffment by cestuique*
 " *use, by the statute 1st Rich. 3d. 'Is like to*
 " *fire out of a flint; so as all the fire which*
 " *cometh out of the flint will not fasten upon*
 " *any thing but tinder or gunpowder.'* In
 " another place: 'Cestuique use makes the
 " feoffment as servant to the feoffees, and if
 " not as servant to feoffees, yet at least as
 " servant to the statute of 1st Rich. 3d'."

I trust, I stand excused for this digression
 upon the exposition of the statute 1 Rich. 3d.
 As to such of the determinations relative
 to this statute as are now rendered unneces-
 sary by the statute 27 Hen. 8. c. 10. I may
 apply the observation of Mr. Robinson,
 in his excellent Treatise of Gavelkind:
 " Many things grow matters of greater cu-

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“riosity, by ceasing to be of use.” But notwithstanding the statute 27 Hen. 8., it is very evident, that a considerable part of the arguments in the great case of Dillon and Freine (or Chudley’s case) was grounded upon the decisions of the courts, and the construction of uses, upon this very statute of Richard 3d. Indeed, what has been advanced relative to terms of years, is a necessary part of legal knowledge. Terms of years are not within the statute 27 Hen. 8.

SECT. VIII.

The history of
uses continued
to 23 Hen. 8.

VIII. BUT to proceed in our historical account of uses: Richard the third, when duke of Gloucester, had frequently been made feoffee to uses. Now as the king could not be seised to a use, as the law then stood, and as it stands to this day, upon the assumption of the crown, Richard would have held the lands discharged of the uses. Therefore, as sir William Blackston observes*, to obviate so notorious an injustice, an act of parliament was immediately passed, which ordained, that where he had been so enfeoffed jointly with other persons, the land

* 2 Com. 332.

should

should vest in the other feoffees, as if he had never been named; and that where he stood solely enfeoffed, the estate itself should vest in cestuique use, in like manner as he had the use.

SECT. VIII.

The history of
uses continued
to 23 Hen. 8.

The first act of parliament, which passed in the succeeding king's reign, related to uses^b. The statute 1 Hen. 7. made a *formedon* maintainable against the pernors of the profits of land enfeoffed to uses. It also allowed the tenant in the same action to have *aid, prayer, voucher, age*, and other advantages.

By this statute, we perceive, that the preceding acts^c, which authorized actions against the pernors, did not extend to a *formedon*.

This statute, which gave a *formedon* only by express name against *cestuique use*, was construed to extend to a *scire facias* to execute an estate tail in remainder by equity^d. But in the construction of this act, it was held in a case^e, where a *scire facias* was

^b 1 Hen. 7. c. 1.

c. 3.

^c 1 Richard 2. c. 9.^d 1 Co. 131. b.^e 4 Hen. 4. c. 7. 11 Hen. 6.^e 11 Co. 62. b.

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brought against the pignor of the profits, that the pignor should not vouch in a *scire facias*; for it should be intended in such action, in which he might vouch: and that the words of the act did not alter the law of vouchers, and give to the pignor any new voucher.

Among the inconveniences which attended the introduction of uses, it was found, that lords lost the benefit of wardship; and, therefore, by a statute 4 Hen. 7. c. 17. the statute of Marlbridge was confirmed; and it was also provided, that the heir of cestuique use of lands held by knight service, being within age, should be in ward; and being of full age, should pay relief. On the contrary, for the benefit of the heir of cestuique use, the same statute provided, that he should have an action against his guardian committing waste.

By the 19 Hen. 7. c. 15. the lands of cestuique use were made subject to execution for his debt, by judgment, recognizance, statute merchant, and of the staple. The lands of cestuique use holden *in soccage*, were also made liable to satisfy the lord his relief, heriot,

heriot, and other duties. Cestuique use also was allowed to have the same advantages as he might have done, if he had been tenant of the land. And lastly, the lands of cestuique use, being a bondman, were seizable by the lord.

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The history of
uses continued
to 23 Hen. 8.

IX. WE have before seen, by the statute of 15 Rich. 2. c. 5. that lands conveyed to the use of religious houses, or bodies corporate, were amortized by licence from the crown. But that statute, it was held, did not extend to conveyances made in trust for parish churches, chapels, churchwardens, companies, fraternities, &c. erected by *common assent*, and not being bodies corporate. Now these alienations were as prejudicial to the lords, as alienations in mortmain: for they thereby lost their wards, heriots, reliefs, &c. To remedy this mischief the statute of 23 Henry 8. c. 10. was made. It recites, "That by reason of
" feoffments made of trust of manors, &c.
" to the use of parish churches, chapels,
" churchwardens, guilds, fraternities, com-
" monalties, companies, or brotherhoods,

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Of the statute
23 Hen. 8. and
the construction
thereof.

* 1 Co. 23. b.

" erected

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Of the statute
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“ erected or made of devotion, or *by com-*
 “ *mon assent* of the people, *without any cor-*
 “ *poration*, and to the uses and intents to
 “ have obits perpetual, or any continual
 “ service of a priest for ever, &c. or to any
 “ other like uses and intents, there groweth
 “ to the king our sovereign lord, and to
 “ other lords and subjects of the realm, the
 “ same like losses and inconveniences, and
 “ is as much prejudicial to them, as doth
 “ and is in case where lands are aliened in
 “ mortmain : Be it therefore enacted, That
 “ all and every such uses, intents, and pur-
 “ poses, of what name, nature, or quality
 “ the same shall be called, &c. shall be
 “ utterly void ; and if any person, in default
 “ of this statute, do bind their heirs, &c.
 “ that then every such pain, penalty, craft,
 “ colour, and every other thing, &c. shall
 “ be utterly void : And that this statute
 “ shall be always interpreted, &c. most be-
 “ neficially to the destruction of such uses,
 “ &c. and of all other like uses and in-
 “ tents.”

I shall make a few observations on this statute.—In the first place, this act was made to prevent conveyances of land, &c. in trust
for

for superstitious purposes, such as to pray for souls supposed to be in purgatory, and the like; which superstitions and errors had crept into the Christian religion, previously to the acknowledgment of Henry the 8th as the supreme head of the church of England^b. But it never intended to prevent alienations in trust for good and charitable purposes; such as finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging of poor inhabitants of a town of common charges, for making of a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, and other like charitable uses^c.

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Of the statute
23 Hen. 8. and
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thereof.

2dly. This act did not make the conveyance itself void, nor did it give the lord any title to enter for mortmain (like the 15 Richard 2. c. 5.): but only made the use void. Therefore if the feoffment had been *within* this statute, the feoffees (if no consi-

^b 1 Co. 24. a.

^c 1 Co. 26. a.

deration

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Of the statute
23 Hen. 8. and
the construction
thereof.

deration had been expressed) would have stood seised, notwithstanding the declaration of uses, to the use of the feoffor and his heirs; but if there had been a consideration, though merely nominal, the use would have vested in the feoffees^d.

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Other statutes
relating to cha-
ritable uses.

X. THERE are many other statutes regulating gifts or conveyances to charitable uses; but an exposition of them does not properly belong to this work. Those who wish to see further into this matter are particularly referred to the acts of 43 Elizabeth, c. 4. and 9 George 2. c. 36. I shall only add here, that, generally speaking, the statutes of charitable uses supply all defects of assurances made to charities^a. Therefore a devise or appointment to a charitable use by tenant in tail, without having previously levied a fine, or suffered a recovery^b, or an appointment, or devise of copyhold lands by a will, without any surrender^c,

^d 1 Co. 24. a. See Attorney General v. Whorwood, 1 Vef. 536.

^a 2 Vern. 755. Attorney General v. Burdett.

^b See Jenner v. Harper, 1 P. W. 247.

^c Attorney General v. Rye, 2 Vern. 453. and Rivett's case, there cited.

will

will effectually in the first instance bar the entail, and in the second pass the copyhold estate. But it seems, that the devise of a rent to a charity by a nuncupative will was void even before the statute of frauds. By the 34 Elizabeth, an appointment of lands without deed was good; but since the statute of frauds, which as to that repeals the 34 Elizabeth, an appointment of lands to a charity, by a will not attested by three witnesses, is void^d.

SECT. X.

Other statutes relating to charitable uses.

XI. WE have now taken a full survey of all the statutes, which I am aware of, relating to uses, previously to the statute of 27 Hen. 8. c. 10. These statutes all tend to consider *cestuique use* as the real owner of the land; and indeed he was made completely so by the statute 27 Hen. 8. c. 10. But before we enter into a discussion of that statute, it will be necessary to consider the learning of uses before it was enacted. Uses had undergone many nice and subtle refinements; and although we have seen, that many acts were passed to prevent the injustice, which these refinements

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^d Vide 1 P. W. 248, 249.

naturally

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naturally produced, yet none of them were found effectual to remedy the evil.

I shall now consider, what were the requisites to be observed in raising uses. In the foregoing pages I have been led to anticipate many things, which properly apply to this place.

A person capable
of standing seised
to a use.

(1). There should have been a person or persons capable of standing seised to a use. Now *prima facie* every common person could stand seised to a use^a: therefore it will be the better mode to enquire, what were the exceptions to this rule? or rather, who had *not* this capacity? A use was before described to be a trust or confidence, which was not issuing out of land, but as a thing collateral, annexed *in privity to the estate*, and to the *person* touching the land. It follows from this explanation of a use, that whenever the legal estate vested in a person, in whom the *confidence of person*, or *privity of estate failed*, the use was either destroyed, or for a time suspended.

^a Therefore a *feme covert* or an *infant* might

have stood seised to a use, Ba. uses, 58.

Therefore, a lord by escheat, or the lord of a villein, could not stand seised to a use; because the title of the lord was by reason of his elder title, and that accrued to him either by reason of the feignory of the land, or of the villein; which title was higher than the use, or confidence, and therefore could not be subject to it. And the same rule applied to a lord, who entered for mortmain, or who recovered by a cessavit, &c. for his title was paramount to the use^b.

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As to privity of estate.

Tenant by the curtesy could not stand seised to a use; for he was *in* by the act of law in consideration of marriage, and was not *in* in privity of estate^c. And it seems by the better opinion, that a tenant in dower could not stand seised to a use^d; and that for the same reason. This point, however, has been doubted by Gilbert, though he seems to acquiesce in it in another place^e. So neither could a disseisor, abator, nor intruder, stand seised to a use, although he had notice^f. So if a feoffee to uses had bound himself in a statute, &c. and the conuzee

^b 1 Co. 122. a. 139. b.
B. N. C. 6c.

^c 1 Co. 122. a.

^d Ibid.

^e Gilb. uses, 11. 171.

^f 1 Co. 122. a. 139. b.

had

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had taken out execution thereupon, he would have held the land discharged of the uses ^z.

Confidence of
person.

Though there had been *privity* of estate, yet if *confidence*, either expressed, or implied, failed in the person, the use was destroyed, or suspended. Thus, if a feoffee to uses had for a valuable consideration enfeoffed another, who had no notice of the former uses, here there was *privity* of estate, but no confidence in the person of the second feoffee; and consequently the use was gone ^h. If the feoffment had been made without consideration to a person, who had no notice ⁱ; or upon a valuable consideration to one, who had notice ^k; in each case the *privity* of estate, and confidence in the person, were preserved; and the feoffee took the estate subject to the former uses.

If there had been tenant for life, remainder in fee to the use of another, and the tenant

^z Bro. feof. al. uf. pl. 10.

^h 1 Co. 122. b. Abbot of Bury v. Bokenham, Dy. 8. 33 Hen. 6.

16.

ⁱ 1 Co. 122. b.

^k Plowd. 351. Year Book 5 Ed. 4. 7.

for life had made a feoffment to one, who had notice; the feoffee could not have stood seised to the former use; for that use was annexed to one estate, and he was in of another^l.

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The king could not stand seised to a use; and therefore if lands had been conveyed to the king and a subject, *pour term de leur vies*, to certain uses, such uses were void as to a moiety of the lands^m. Neither could the queen be a feoffee to usesⁿ.

A corporation, abbé, mayor, commonalty, and persons attainted*, were under the like disability. So in a case, where an alien and another person were enfeoffed to uses, the crown became entitled to a moiety of the land discharged of the uses^p.

^l 1 Co. 122. b.

^m Year Book, 7 Ed.
4. 17. Ba. uses, 56, 57.
Berkley's case, Plowd.
238. (c).

ⁿ Bac. uses, 57.

^o B. N. c. 6c. Bro.

feof. al. uses, 40. 1 Co.
122. a. Ba. uses, 57, 58,
59. Dy. 8. b. But see
Halfpenny's case, Year
Book, 14 Hen. 8. 8. a.

^p King v. Boys, Dy.
283. b.

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As to the limitation of uses upon the estates of tenant in tail, for life, and for years, I have already said enough upon that subject.

A person capable
of receiving or
taking the use.

(2.) There should have been a person capable of receiving or taking the use.

As to this point it may be observed, that all persons capable of taking a conveyance of the lands, might have taken the same estate by way of use; therefore the limitation of a use to a corporation was good; if a licence for that purpose had been obtained^q. So the king could have been cestuique use by matter of record; and therefore if a fine had been levied, or recovery suffered, and the use declared to the king by deed *inrolled*, the king would have been entitled as cestuique use, though he was not a party to the declaration^r. But it was absolutely necessary, that both the declaration and conveyance should be matter of record.

^q Shep. T. 509.

^r Bac. uses, 60.

The limitation of a use to the parishioners of any particular place was void ^s.

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Whether an alien could have been cestuique use was an undetermined point; some holding, that a use, being merely in conscience, equity might have directed the execution of it for the benefit of the alien ^t; whilst others contended, that an alien could not have compelled the feoffees to execute the use; it being contrary to the policy of the law of the kingdom, that an alien should plead or be impleaded touching lands in any of our courts ^u.

(3.) There should have been either a consideration to raise, or a declaration of, the use. Indeed, where an express declaration of the use was made on the feoffment, a pecuniary consideration, or the want of it, could not vary the use so declar-

A consideration or declaration of the use.

^s Year Book, 13 Hen. 7. 9. b. Bro. feof. al. uses, 29. Shep. T. 509.
^t 12 Hen. 7. 28. a. Bro. feof. al. uses, pl. 29. Allen, 14. Vide preamble to the stat. 27 Hen. 8.

c. 10.

^u Gilb. uses, 43. Allen, 15, 16. Styles, 40. Ba. uses, 43. See post, whether an alien may be cestuique trust at this day.

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ed^w. Therefore if A. had delivered money to J. S. for the purpose of purchasing lands for him, and J. S. had purchased them *to his own use*, no use could have resulted to, or be implied in, A^x. So if A. in consideration of 100 l. paid to him by B. had enfeoffed B. and C.; the declaration of the use to B. and C. would have been good, notwithstanding the payment of the money by B. only^y.

When no declaration of the use was made, the consideration paid by the feoffee or grantee created a use for him. If neither a consideration had been paid or reserved, nor a declaration made, the use would have resulted to the grantor^z, and he would have been *in* as of the old use. It was therefore determined, that if a man, seized *ex parte maternâ*, had made a feoffment, levied a fine, or suffered a recovery without having declared the use, and without consideration, the use would have resulted to him and his heirs

^w Perk. S. 537. See Calthorp's case, Moor, 102. 1 Co. 176. b.

^x Bro. feof. al. uses, 40. See *infra*, chap. 3.

as to trusts.

^y Same's case, 2 Roll. ab. 791.

^z Perk. 533.

on the part of his mother ^a. This observation will apply to the conveyance by lease and release, as I shall endeavour hereafter to explain. So if there had been two joint tenants, the one in fee, and the other for life, and they had levied a fine without having declared the use, it would have resulted to them according to their estates or interests in the land ^b. In like manner, if A. seised in fee of an estate, had joined with B. in levying a fine, without a declaration of the use, it would have resulted to A. *only*, and his heirs ^c.

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It should seem, that any pecuniary consideration, however trifling it might have been, or any rent reserved, however inconsiderable, would have been sufficient to raise the use to the feoffee, conuzee, or recoveror ^d.

The above remarks applied only to conveyances *in fee*. The conveyance or creation of estates *tail*, for *life*, or *years* (so far

^a 1 Co. 100. b. Har.
Co. Litt. 12. b. n. 2. 2
Salk. 591. 3 Lev. 406.
2 Rol. ab. 780. 2 P. W.
139.

Co. 58. a.

^c Ibid.

^d Porter's case, 1 Co.
24. a. 2 Roll. ab. 787,
788.

^b Beckwith's case, 2

SECT. XI.

The requisites
to be observed in
raising uses.

as related to the doctrine of uses) depended upon different principles^e.

In respect of grants of *incorporeal* property, it must be noticed, that if a man seised of a rent-charge in fee, had made a conveyance of it, without having declared the use, and without any consideration, the grantee would have stood seised to the use of the grantor and his heirs^f. But if the proprietor of lands had granted a rent-charge thereout unto a stranger, the law would not presume, that such grant was intended for the grantor's use, though no use had been declared, nor consideration paid^g; and upon a conveyance of a seignory or rent in tail, for life, or for years, without declaration of the use, and without consideration, the grantee would have been seised to his own use^h.

A substance or
hereditament.

(4.) There should have been a sufficient substance or hereditament, out of which the use might have arisen. Thus, all local inheritances, as lands, houses, rents in esse,

^e See ante, 40 to 50.

^f Perk. S. 530.

^g Ibid. 531.

^h Ibid. 537.

reversions,

reversions, remainders, liberties, and franchises, might have been conveyed to uses. But it was different as to *personal* inheritances, such as annuities. So, it was said, that uses could not have been raised out of such things *quæ ipso usu consumuntur*, as commons, ways in gross, or authorities granted to a man and his heirs to hunt in a park, chase, or forest¹.

SECT. XI.

The requisites to be observed in raising uses.

XII. I SHALL now examine the properties of the use.

SECT. XII.

The properties of a use.

(1.) It was descendible according to the rules of the common law respecting estates of inheritance^a; the courts of equity having, in this instance, adopted the maxim, that *æquitas sequitur legem*. Therefore there might have been a *possessio fratris* of a use^b; though indeed Lord Bacon calls this a vulgar opinion^c; observing, that it meant nothing more, than that the chancellor would consult with the rules of law, where the intention of the par-

It was descendible.

¹ Wm. Jones, 127.

^a 2 Roll. ab. 780.

^b Year Book, 5 Ed. 4.

7. b. 1 Co. 88. a. 121. b.

4 Co. 22. a. Co. Litt.

19. b. Dy. 10, 11. Plowd.

58.

^c Bac. uses, 11.

SECT. XII.

The properties
of a use.

ties did not specially appear. The rule however, was certainly established in chancery.

So the use of lands held in borough English would have descended to the youngest son, and that of gavelkind to all the sons^d; and where there was a custom of a manor, that the lands should descend to the eldest daughter, in default of sons, it was determined, that the use should descend in like manner^e.

It was deviseable.

(2.) The use was deviseable before the statute of wills. After the conquest a devise could not operate upon the lands; because, by the common law the ceremony of livery of seisin was necessary to the transfer of them; and because it was contrary to the very nature of a *feud*, that the feudatory should dispose of it by will. But the courts of equity, under the colour of allowing a devise of the use, did in effect permit the legal interest in the lands

^d 2 Roll. ab. 780. 1
Co. 88. a.

^e 2 Rol. ab. 780.

to be devised^f. An infant however was disabled from devising the use^g.

SECT. XII.

The properties of a use.

(3.) As cestuique use might have devised, so might he have aliened or transferred the use^h; and by the statute 1 Rich. 3. he might have conveyed the legal estate. But it is observable, that in the case of a *feme covert*, a *fine* was necessary to pass her useⁱ.

It was alienable.

(4.) But cestuique use, in respect to the legal ownership of the land, had neither *jus in re*, nor *ad rem*^k. Therefore when in possession, he was considered merely as tenant by sufferance^l. He could not bring

Cestuique use had neither *jus in re*, nor *ad rem*.

^f See Wright's Ten. 172. 174. ed. 1768. Year Book, 10 Hen. 7. 26. 27 Hen. 8. 7. 1 Co. 123. b.

^g See Year Book, 21 Ed. 4. 24. 2 Roll. ab. 779.

^h Bro. feof. al. uses, pl. 44. B. N. C. 75. Plowd. 350. Bac. uses, 16.

ⁱ Year Book, 7 Ed. 4. 14.

^k 1 Co. 121. b. W. Jones, 127. Bac. uses, 5.

^l Year Book, 15 Hen. 7. 2. 4 Ed. 4. 8. Bro. feof. al. uses, 39. Plowd. 3. a. (Basset v. Manxell.) It should seem from Hard. 491. that he was considered as tenant *at will*, and might therefore have taken a *release*.

SECT. XII.

The properties
of a use.

an action, avow, nor justify for damage
faisant in his own name^m. When he made
a lease pursuant to the statute 1 Rich. 3. the
reversion still continued in the feoffees, who
might have brought an action for waste, or
have entered for a forfeitureⁿ. By force of the
last mentioned statute, he might have grant-
ed the herbage or corn, yet he could not have
taken them for his own use^o. So his wife
was not dowable of the use^p; and the hus-
band of feme cestuique use could not have
his curtesy^q. Cestuique use did not forfeit
his lands for treason nor felony^r; and the
use was not considered as assets in the hands
of the heir, nor executor, to satisfy credi-
tors^s.

The several statutes before enumerated,
and the preamble of the statute 27 Hen. 8.
c. 10. point out a variety of other inconve-
niences attending the above principle, that

^m Bro. feof. al uses. pl.
39. 13. b.

ⁿ Ibid. 26. Year Book,
5 Hen. 7. 5.

^o Bro. pl. 13. 5 Hen.
7. 2.

^p Perk. S. 349.

^q Ibid. 463. 1 Co.
123. b.

^r Jenk. cent. 190.
Year Book, 5 Ed. 4. pl.
18.

^s 1 Co. 121. b.

cestuique

cestuique use had no legal right nor title to the lands.

SECT. XII.

The properties of a use.

(5.) Cestuique use, indeed, might have been sworn upon an inquest¹: but this rule was established under particular circumstances; for, as Sir Edward Coke observes, at the time of making the statute 2 Hen. 5. c. 3. the greater part of the lands in the kingdom were held in use; an event occasioned by the unhappy controversy between the houses of York and Lancaster. Now that statute was made to remedy a mischief, which happened from the sheriff's having frequently returned men of no understanding², and it therefore provides, that he should return proper men. The courts therefore, for the advancement and expedition of justice, extended it (against the letter) to the cestuique use of lands, and not to his feoffees.

Cestuique use might have been sworn upon an inquest.

(6.) As to the feoffee he was complete owner of the land at law. He performed the feudal duties³; his wife had

The feoffee was complete owner.

¹ Co. Litt. 272. a.

² See note 1. Butl.

³ See Year Book, 15

Co. Litt. 271. b.

Hen. 7. 13.

dower;

SECT. XII.

The properties
of a use.

dower^x; and his estate was subject to wardship, relief, &c. He had power of selling the lands, and forfeited them for treason or felony. In short, he might have brought actions, and have exercised every kind of ownership over, or in respect of, the lands^y.

Uses differed in
many instances
from cases of
possession.

(7.) We have seen, that the use did in some instances ensue the nature of the land; as in cases of descent, and where it had been declared, or resulted, to the grantor or feoffor. But uses, as Bacon observes, differed in many instances from cases of possession. Thus, by the common law, warranty could not have bound the right of a use, as it would have done the right of possession^z. There was no necessity at common law for a consideration to establish a deed, nor did notice constitute covin: but it has already been explained, how materially a conveyance to uses was affected by the want of a consideration, or by notice. In the case of possession, a rent out of land, and the land itself, cannot stand together: but

^x Bro. feof. al. uses,
pl. 10.

^y Dy. 9. b. Jenk.

190. and the several cases
before cited.

^z Bac. uses, 12.

it was otherwise in the case of a use. To the above differences, mentioned by Bacon^a, I may add, that the word, *heirs*, was necessary at common law to create an estate in fee-simple. But if a bargain and sale had been made before the statute of uses, the bargainee would have had an estate *in fee* in the use without the word heirs^b; because the bargainee having paid a valuable consideration, the courts of equity would have directed the use according to the intention of the parties. So if an estate had been limited at common law to a man, and to such woman as he should afterwards marry, the man would have taken the whole^c; but the limitation of the use in the above manner would have been good^d. So if there had been a feoffment in fee to the use of A. for years, with remainder to the use of the right heirs of J. S. this contingent remainder would have been good; for the feoffees remained tenants of the freehold^e.

SECT. XII.

The properties of a use.

^a See Bac. uses, from 11 to 18.

^c Moor. 96. pl. 240.

^b 1 Co. 100. b. Co. Litt. 9 b.

^d 1 Co. 101. a. Dy.

190. pl. 17, 18.

^e 1 Co. 135. a.

XIII. SUCH

Sect. XIII.

The statute 27
Hen. 8. c. 10.

XIII. SUCH then was the learning, and such the state of uses at the time, when it was deemed expedient to pass the statute 27 Hen. 8. c. 10., commonly called the statute of uses. They were attended, as the reader must have remarked, with considerable inconveniencies, and serious mischiefs; and they had hitherto baffled the partial attacks of the legislature. It was now found expedient to apply some effectual remedy to the evil; and it is said, that Henry the Eighth, being displeased at the loss of wardships, and at other injuries done to him, complained to the judges of the defect of the law in that respect; and that they hinted to him, "that if the possession might be joined to the use, all would go well." This advice probably laid the foundation of the statute of uses.

Preamble.

The statute recites, "Where by the common laws of this realm, lands, tenements, and hereditaments be not deviseable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing

^a 2 Leon. 17, 18.

" sufficient

“ sufficient made *bonâ fide*, without covin or
“ fraud; yet nevertheless divers and sundry
“ imaginations, subtle inventions, and prac-
“ tices have been used, whereby the here-
“ ditaments of this realm have been con-
“ veyed from one to another by fraudulent
“ feoffments, fines, recoveries, and other
“ assurances, craftily made to secret uses,
“ intents, and trusts; and also by wills and
“ testaments sometime made by *nude parols*,
“ and words, sometime by signs and to-
“ kens, and sometime by writing; and for
“ the most part made by such persons as be
“ visited with sickness, in their extreme
“ agonies and pains, or at such time as
“ they have scantly had any good memory
“ or remembrance; at which times they
“ being provoked by greedy and covetous
“ persons, lying in wait about them, do
“ many times dispose indiscreetly and unad-
“ visedly their lands and inheritances; by
“ reason whereof, and by occasion of which
“ fraudulent feoffments, fines, recoveries,
“ and other like assurances to uses, confi-
“ dences, and trusts, divers and many heirs
“ have been unjustly at sundry times dis-
“ herited, the lords have lost their wards,
“ marriages, reliefs, harriots, escheats, aids

SECT. XIII.

The Statute 27
Hen. 8. c. 10.

“ pur

SECT. XIII.

The statute 27
Hen. 8. c. 10.

“ *pur fair fitz chivalier, & pur fill marier;*
 “ and scantly any person can be certainly
 “ assured of any lands by them purchased;
 “ nor know surely against whom they shall
 “ use their actions, or execution, for their
 “ rights, titles, and duties; also men mar-
 “ ried have lost their tenancies by the cour-
 “ tesy, women their dowers, manifest per-
 “ juries by trial of such secret wills, and
 “ uses, have been committed; the king’s
 “ highness hath lost the profits and advan-
 “ tages of the lands of persons attainted,
 “ and of the lands craftily put in feoffments
 “ to the uses of aliens born, and also the profits
 “ of waste for a year and a day of lands of
 “ felons attainted, and the lords their escheats
 “ thereof; and many other inconveniencies
 “ have happened, and daily do increase
 “ among the king’s subjects, to their great
 “ trouble and inquietness, and to the utter
 “ subversion of the ancient common laws of
 “ this realm: For the extirpating and extin-
 “ guishment of all such subtle practised
 “ feoffments, fines, recoveries, abuses, and
 “ errors heretofore used, and accustomed in
 “ this realm, to the subversion of the good
 “ and ancient laws of the same, and to the
 “ intent that the king’s highness, or any
 “ other

" other his subjects of this realm, shall
 " not in anywise hereafter, by any means
 " or inventions be deceived, damaged, or
 " hurt by reason of such trusts, uses, or con-
 " fidences, it may please the king's most
 " royal majesty, that it may be enacted by
 " his highness, by the assent of the lords
 " spiritual and temporal, and the commons
 " in this present parliament assembled, and
 " by the authority of the same, in manner
 " and form following, that is to say, That
 " where any person or persons stand, or be
 " seised, or at any time hereafter shall hap-
 " pen to be seised, of and in any honours,
 " castles, manors, lands, tenements, rents,
 " services, reversions, remainders, or other
 " hereditaments, to the *use, confidence, or trust*
 " of any *other* person or persons, or of any
 " body politic, by reason of any bargain,
 " sale, feoffment, fine, recovery, covenant,
 " contract, agreement, will, or otherwise,
 " by any manner of means whatsoever it
 " be; that in every such case all and every
 " such person and persons, and bodies poli-
 " tic, that have, or hereafter shall have, any
 " such use, confidence, or trust, in fee sim-
 " ple, fee tail, for term of life, or of years,
 " or otherwise, or any use, confidence, or

SECT. XIII.

The statute 27
Hen. 8. c. 10.The possession
shall be in him
or them that
have the use.

SECT. XIII.

The statute 27
Hen. 8. c. 10.

“ trust in remainder, or reverter, shall from
 “ henceforth stand, and be seised, deemed,
 “ and adjudged in lawful seisin, estate,
 “ and possession, of and in the same ho-
 “ nours, castles, manors, lands, tenements,
 “ rents, services, reversions, remainders,
 “ and hereditaments, with their appurte-
 “ nances, to all intents, constructions, and
 “ purposes in the law, of and in such like
 “ estates, as they had or shall have in use,
 “ trust, or confidence, of or in the same;
 “ and that the estate, title, right, and pos-
 “ session, that was in such person or persons,
 “ that were or hereafter shall be seised of
 “ any lands, tenements, or hereditaments,
 “ to the use, confidence, or trust of any such
 “ person or persons, or of any body politic,
 “ be from henceforth clearly deemed and
 “ adjudged to be in him or them, that have
 “ or hereafter shall have such use, confi-
 “ dence, or trust, after such quality, manner,
 “ form, and condition, as they had before in
 “ or to the use, confidence, or trust that was
 “ in them.

S. 2. Convey-
 ances made to
 different persons
 to the use of
 one or some of
 them.

“ That where divers and many persons
 “ be, or hereafter shall happen to be, jointly
 “ seised of and in any lands, tenements, rents,
 “ reversions,

“ reversions, remainders, or other heredita-
 “ ments, to the use, confidence, or trust, of
 “ any of them that be so jointly seised, that
 “ in every such case, that those person or
 “ persons which have or hereafter shall have
 “ any such use, confidence, or trust, in any
 “ such lands, tenements, rents, reversions,
 “ remainders, or hereditaments, shall from
 “ henceforth have, and be deemed and ad-
 “ judged to have only to him or them that
 “ have or hereafter shall have any such use,
 “ confidence, or trust, such estate, possession,
 “ and seisin of and in the same lands, tene-
 “ ments, rents, reversions, remainders, and
 “ other hereditaments, in like nature, man-
 “ ner, form, condition, and course, as he or
 “ they had before in the use, confidence, or
 “ trust of the same lands, tenements, or he-
 “ reditaments: saving and reserving to all
 “ and singular persons, and bodies politic,
 “ their heirs and successors, other than those
 “ person or persons which be seised, or here-
 “ after shall be seised, of any lands, tene-
 “ ments, or hereditaments, to any use, con-
 “ fidence, or trust, all such right, title, entry,
 “ interest, possession, rents, and action, as
 “ they or any of them had or might have
 “ had before the making of this act.

SECT. XIII.

The statute 27
 Hen. 8. c. 10.

Saving of the
 right of stran-
 gers.

SECT. XIII.

The statute 27
Hen. 8. c. 10.

Saving of the
right feoffees to
their own use.

3. " And also saving to all and singular
" those persons, and to their heirs, which be
" or hereafter shall be seised to any use, all
" such former right, title, entry, interest,
" possession, rents, customs, services, and ac-
" tions, as they or any of them might have
" had to his or their own proper use, in or
" to any manors, lands, tenements, rents, or
" hereditaments, whereof they be, or here-
" after shall be, seised to any other use, as if
" this present act had never been had nor
" made, any thing contained in this act to
" the contrary notwithstanding ^b.

4. " And where also divers persons stand
" and be seised of and in any lands, tenements,
" or hereditaments, in fee simple or other-
" wise, to the use and intent that some other
" person or persons shall have and perceive
" yearly to them, and to his or their heirs,
" one annual rent of £. 10. or more or less,
" out of the same lands and tenements, and

^b Upon this clause, see
Ferrers v. Fermor, Cro.
Jac. 643. 1 Vent.
195. 280. Cecil's case, 7
Co. 19. b. 20. a. 2 Roll.
rep. 245. 1 Mod. 107.

See as to a feoffment
made by a lord to his
copyholder to the use of
others. Ifed's case cited
7 Co. 39.

" some

“ some other person one other annual rent
 “ to him and his assigns, for term of life or
 “ years, or for some other special time, ac-
 “ cording to such intent and use as hath
 “ been heretofore declared, limited, and
 “ made thereof.

SECT. XIII.

The statute 27
 Hen. 8. c. 10.

“ Be it enacted therefore by the authority
 “ aforefaid, That in every such case, the
 “ same persons, their heirs and assigns, that
 “ have such use and interest, to have and
 “ perceive any such annual rents, out of any
 “ lands, tenements, or hereditaments, that
 “ they and every of them, their heirs and
 “ assigns, be adjudged and deemed to be in
 “ possession and seisin of the same rent, of and
 “ in such like estate as they had in the title,
 “ interest, or use of the said rent or profit,
 “ and as if a sufficient grant, or other lawful
 “ conveyance, had been made and executed
 “ to them, by such as were or shall be seised^e
 “ to the use or intent of any such rent to be
 “ had, made, or paid, according to the very
 “ trust and intent thereof; and that all and
 “ every such person and persons as have
 “ or hereafter shall have any title, use, and

§ S. The execu-
 tion of rents.

^e Dyer, 362. b. pl. 21.

Stat. XIII.

The statute 27
Hen. 8. c. 10.

“ interest, in or to any such rent or profit,
 “ shall lawfully distrein for non-payment of
 “ the said rents, and in their own names
 “ make avowries, or by their bailiffs or ser-
 “ vants make conisances and justifications,
 “ and have all other suits, entries, and re-
 “ medies, for such rents^d, as if the same
 “ rents had been actually and really granted
 “ to them with sufficient clauses of distress,
 “ re-entry, or otherwise, according to such
 “ conditions, pains, or other things, limited
 “ and appointed upon the trust and intent
 “ for payment or surety of such rent.”

By the 6 f. it is enacted, That no woman shall have both a jointure and dower of her husband's lands.—By f. 7. a woman shall be endowed, where she is deprived of her jointure by lawful action, &c.—By f. 9. it is provided, that a woman may accept or refuse a jointure, settled after marriage.—By f. 10. it is further provided, that the statute should extinguish no statute, recognizance, &c. by the execution of any estate. Thus, for instance, if a man had an extent of 100 acres, and an use of the inheritance of one; now, the statute

^d See upon this head *Bascawin and Herle, v. Cooke*,
 3 Mod. 223.

executing

executing the possession to that one would have extinguished the extent, being entire in all the rest: or if the conusor of a statute, having 10 acres liable to the statute, had made a feoffment in fee to a stranger of two of those acres, and after had made a feoffment in fee to the use of the conusor and his heirs, this would have extinguished the recognisance^e.—S. 12, 13, direct, where fines for alienations, relief, and harriots, shall be paid to the king or common persons.—By f. 14. cestuique use may have all such actions and advantages as his feoffees might have had;—by f. 15, however, actions then depending by the feoffees were not to be abated.—By f. 16. it is provided, that the act shall not be prejudicial to the king on account of wardship, liveries, or for ouster, le main.—The 17. f. is concerning recognizances taken to the king's use. And f. 18. relates to lands executed to persons born in Wales.

^e Ba. uses, 53.

CHAP. II.

Of Uses since the Statute 27 Hen. 8. c. 10.

SECT. I.

The statute did
not abolish uses
altogether.

I. **W**HATEVER might have been the intention of the legislature, the statute 27 Hen. 8. c. 10. certainly did not effectuate the total abolition of uses: it has merely destroyed the intervening estate of the feoffees, or grantees; and thereby converted the equitable, into a legal, estate.

Some have thought^a, that the statute intended to extirpate uses altogether, and never meant, that lands should pass subsequently to the statute by way of use, but only by solemn livery. And therefore they held, that these words of the statute, "*Where any person or persons stand or be seised, or at any*

^a 1 Co. 125. a. b.

"time hereafter shall happen to be seised," do not serve as a proof, that the makers of the act expected, that uses would be continued afterwards; but that those words were only inserted to provide for a case, which possibly might occur: as, supposing that a feoffee to uses had been disseised before the act, and then it had been made; now, at the time of making the act, he certainly was not seised to the use of any person; but he might afterwards, by his entry, revert the uses, and then, being seised to the uses after the act, the use would have been executed to cestuique use. But this appears to me to be an overstrained construction of the words of the statute. Can it be supposed, that the framers of an act, which, as lord Bacon has observed^b, contains the wisest and fittest ordinances, and the most foreseeing and circumspect savings and provisoes, could not foretell, that there might have been future conveyances to uses? Were they unacquainted with the doctrine of resulting uses? And if they had intended, that lands should not pass by such future conveyances, when operating by way of use,

SECT. I.

The statute did not abolish uses altogether.

^b Bac. uses, 30.

and

SECT. I.

The statute did
not abolish uses
altogether.

and that resulting uses should not be executed by the statute, can it be supposed, that they would not have expressed themselves clearly and explicitly upon those heads? On the contrary, the statute of inrollments shews, that the legislature meant *obiter* to sanction uses, by making an additional ceremony necessary to the conveyance of them. The 12. s. of the act speaks of estates *to be* made and executed in possession *after* a particular period. In short, I must agree with lord Bacon, that the statute never intended to abolish uses. He says^c, in speaking of a person who doubted of this doctrine, "And this was the exposition, as tradition goeth, that a reader of *Gray's Inn*, who read soon after the statute, was in trouble for, and worthily, who, as I suppose, was a *boy*." Indeed, with respect to a disseisin, before the statute, it was held by the same writer, that the regress of the feoffees, after the statute, was excluded by the two savings of the statute: for the first saving, respects the right of all persons, *except the feoffees*; and the second, saves the right of the feoffees to *their own use*; so that between both, the right of the feoffees to the use of *another*, was shut out.

^c Bac. uses, 40.

II. THERE

II, THERE are several circumstances necessary to the raising and execution of uses, by virtue of the statute.

SECT. II.

Of the circumstances necessary to the execution of a use by the statute.

A person seised to the use.

(1.) There should be a person seised to the use: and here I must observe, that the same persons, who were capable of being seised to a use before the statute, are now *alone* capable of being grantees, releasees, &c. to uses; except in the case of a tenant *for life*^a, and perhaps of a tenant in tail.

Lord Coke^b, Bullstrode, and others, expressly tell us, that it was settled in the case of *Cooper, v. Franklyn*, that tenant in tail could not, either before or since the statute, stand seised to the use of another person, either by express declaration or implication. Whilst on the other hand, Godbolt^c asserts, that the determination in that case was, that

Whether a tenant in tail may stand seised to a use.

^a Shep. T. 507. 2 Leon. 16. Vaugh. 49. Crawley's case, Cro. Eliz. 721. Dy. 186. a. See Williams v. Jekyl, 2 Vef. 682.

^b Co. Litt. 19. b. 2

Co. 78. a. Cro. Jac. 400. 401. Bullst. 186. Moor. 848. 1 Roll. rep. 384. 2 Roll. ab. 780. Year Book, 27 Hen. 8. 10. Shep. T. 509.

^c Godb. 269.

tenant

SECT. II.

Of the circumstances necessary to the execution of a use by the statute.

tenant in tail might stand seised to an express use *since* the statute: and lord Bacon^d, and others adopt the latter opinion.

The reasons, why a tenant in tail could not stand seised to uses before the statute, were two: the one on account of the consideration of *tenure* between the donor and donee: and the other, on account of the statute West. 2. c. 1. which had appropriated, as it were, the lands solely to the use of the tenant in tail^e. It required, *quod voluntas donatoris in omnibus observetur*^f. This provision was made, in order that the alienation of the donee should not be a bar to the issue. Now it was a rule, that no person could stand seised to a use, unless he could lawfully execute the estate to cestuique use. This a tenant in tail could not do without committing a wrong, for which the issue in tail had a remedy by writ of *formedon*.

It must be remembered, that when these notions were introduced, the possession and

^d Bac uses, 57, 58.

² Leon. 16. Dy. 311. b.

^e Co. Litt. 19. b.

^f Bro. seof. al uses, pl.

40. B. N. C. 60.

use were perfectly distinct estates. The feoffee was compleat owner of the land, and he performed the feudal duties: and as the donee in tail held the land immediately of the donor, the tenure alone was incompatible with a use. If to this consideration we add the construction put upon the statute West. 2., it is no matter of surprise, that tenant in tail was considered incapable of standing seised to another's use.

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But the real question now appears to be, are the words of the statute sufficiently comprehensive to include estates tail? There can be no doubt, but that the word, *seised*, will extend to and comprize every freehold seisin; and there is nothing in the statute, which saves the right of the tenant in tail. Is there any thing then peculiar in the nature of an estate tail, which can exempt it from the general operation of the act? I think not: for in the first place, the reason formerly urged against the capacity of the tenant in tail to hold in use, that he could not execute the estate tail to his cestuique use, without committing a wrong, appears now to be altogether inapplicable to the execution of uses; inasmuch as the use is executed by

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the operation of the statute, and not by the donee. He has but a momentary seisin. In the next place, as to the argument from the nature of the tenure between the donor and donee, I must observe, that the same consideration of tenure, which would have appropriated the use to the tenant in tail, would, as Brooke informs us, have carried it to a tenant for *life*, before the statute^a; and yet it is a point now universally acknowledged, that if land be given to A. for *life*, to the use of B. for *life*^b, the statute executes the use in B. Now as A. could not stand seised to a use before the statute, and as the statute, which mentions the word *trust* as well as *use*, would now execute the use, or rather trust in B, I am induced to believe, that the statute executes not only uses limited to arise out of the seisin of feoffees *in fee*, but also *trusts* or *confidence*, limited upon the possession of those persons, whose *particular estates* in the lands necessarily drew the *use* to them, as tenants *in tail*, and for *life*. Therefore, if the statute had mentioned the word *possessed*, as well as *seised*, I apprehend,

^a Bro. feoff. al uses,
pl. 40. See ante, 7. 40.

^b See ante, 91.

that

that the trusts, declared upon a term of years, would have been executed by the statute.

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Since the statute of uses, it has been a frequent practice for tenants in tail to create a freehold for the purpose of making tenants to the præcipe in order to the suffering of common recoveries, by the conveyance of *bargain and sale*. Hence it has been argued, that it has been the received opinion among conveyancers, that a tenant in tail can stand seised to a use, inasmuch as no person can convey by that species of assurance, who is incapable of being seised to a use: and that as many, if not most, of the titles to estates in this kingdom depend upon the validity of recoveries suffered under the above circumstances, it would be dangerous to controvert the principle, upon which the legality of a bargain and sale by a tenant in tail is supposed to depend. These however are not, in my opinion, conclusive arguments. In making a tenant to the præcipe, the only thing absolutely necessary is, that there should be a *freehold* in the bargainee either for his own life, or that of the *bargainor*. Now the great question in respect to a tenant in tail appears to be, whether the tenant in tail can,

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can, as to the full extent of the limitation to the heirs of his body, stand seised to a use, and thereby deprive the issue of an estate, which, it has been said is fixed and appropriated to them by the statute *de donis*. But as a tenant for life can now stand seised to a use, so, I conceive, a tenant in tail may, *quoad* his own life interest; without at all interfering with the principal question before stated.

A cestuique use in esse.

(2.) As there should be a person seised to a use, so there must be a *cestuique use in esse*. And I must observe, that all persons, who were capable of taking before the statute, can now take under the limitation, or by way, of a use¹; and the statute on the part of cestuique use particularly couples the words *body politic* with that of person.

The statute says, "That where any person or persons stand or be seised, &c. to the use, confidence, or trust of any other person or persons, &c.;" and therefore if a use be limited to a feoffee, conuzee, recoveror, or releasee, such use, generally

¹ See ante, Ch. I. S. XI. (2.)

speaking,

speaking, is not executed by the statute, but the feoffee, &c. is in by the common law^{*}. In this case, though the feoffee, releasee, or conuzee, be in by the *common law*, yet after the declaration of the use to him, he has not only a seisin or possession, but a *use*; though not such an use as the statute requires; and therefore that seisin, which, before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation wholly filled up, and will not admit of any other uses being limited thereon; upon the principle, that a use cannot be limited upon a use. I perceive, that Gilbert puts this case¹, if a feoffment be made in fee to the *use* of the feoffee and his heirs, in *trust* for J. S. and his heirs, quære, whether this use or trust be not executed in J. S. by the statute? For, says he, it seems, that the feoffee is in by the *common law*, and so the *statute not satisfied*. There cannot however be the smallest doubt, but

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see Co. Litt. 237.

^{*} Samme's case, 13 Co. 56. Altham v. Anglesey, Gilb. rep. 16, 17. Long v. Buckenridge, 1 Stra.

106. Ba. uses, 43. 62. Gwam v. Roe, 1 Salk. 90.

¹ Gilb. uses, 194.

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that the limitation of a use to a third person, after a previous declaration of it to the feoffee, is void, and cannot be executed by the statute^m.

In a caseⁿ, where M. gave his land to E. R. and his wife, *habendum* to the said *baron and feme*, to the *use* of them, and *the heirs of their two bodies*, and for want of such issue, remainder to E. M. and his heirs; the question was, whether the baron and feme had an estate tail, or an estate for their lives only? It was argued, that the estate, out of which the use should arise, was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin: but the judges conceived, that there was a difference, where an estate was limited to one, and the use to a stranger, for there the use should not be more, than the estate, out of which it was derived; but not when the limitation was to two, *habendum* to them,

^m See Moor, 46. in pl. 138.

Cro. Car. 230. 244. See Young v. Dymock, Dy.

ⁿ Jenkins v. Young,

186. a. in notis.

to the use of the heirs of their bodies, for this was *no limitation of the use*, nor was it executed by the statute; but it was a limitation of the *estate* to them and the heirs of their bodies *by the course of the common law*.

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So if an estate be conveyed to A. B. and C. and their heirs, "To hold unto the said A. B. and C. their heirs and assigns, to the use of the said A. B. and C. for and during the natural lives of them, and the life and lives of the survivor and survivors of them;" it should seem, that this is not a statute-use; but that A. B. and C. will take an estate of freehold for their lives by the common law.

However, to the rule just alluded to, there are some exceptions: for in some particular cases, a feoffee shall have a use limited to himself, and shall also have that use executed by the statute.

* Bac. uses, 63. See Mr. Booth, published in an excellent opinion upon this case by the late the collection of cases and opinions, vol. 2. 281.

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First, where the use is limited to the feoffee in tail out of his own seisin in fee, and the remainder over to another: as if a feoffment be made to J. S. in fee, to the use of himself in tail, with remainder to D. in fee; or if J. S. covenant to stand seised to the use of himself in tail, with remainder to the use of his wife in fee; in both these cases the estates tail limited to J. S. are executed by the statute^p. But I apprehend, that the construction would have been different in the case of the feoffment, if the whole seisin had not been limited to the feoffee; thus, if the feoffment had been made to J. S. *generally, habendum* to and to the use of *himself in tail*, with remainder to the use of A. B. in fee. Now in this case J. S. has not a seisin to serve the use to A. B.; and therefore, if the remainder to him can take effect at all, it must take effect by the livery made to J. S. in the course of possession by the common law^q. So too the

^p Bac. uses, 63. 13 Co. 36.

^q See 2 Roll. ab. 68. Litt. sec. 60. If a feoffment had been made to A. for years, remainder

to B. in fee, and the livery had been made to A. this would have passed the fee to B. in course of possession at common law.

construction

construction is different, if the use upon the feoffment be in the first instance limited to the feoffor or a stranger for life, or in tail, with the remainder to the feoffee in fee; and it should also seem, that if the first use be limited to the feoffee *for life, or for years*, with the remainder over in fee, he will take by the common law.

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Secondly. Where the whole feisin in fee is conveyed to the feoffee, and many estates in the use are carved out of such feisin, one of which estates the feoffee takes; as if A. be enfeoffed to the use of C. D. for life, remainder to the use of himself for life, remainder to the use of J. N. in fee; the use limited to the feoffee will be executed by the statute; for the law will not admit fractions of estates.

Thirdly. If J. S. be enfeoffed to the use of himself and a stranger; or if a feoffment be made to a bishop *and his heirs*, to the

¹ Co. Litt. 22. b. Bac. Booth's op. cited ante.
uses, 64.

² Ibid. 64.

³ Bac. uses, 63. and fees

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use of himself and *his successors*; the use is executed by the statute in both cases".

Here I cannot with propriety omit the following advice of Lord Bacon". "Now let me advise you of this, that it is not a matter of subtilty or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of possession; but it is material for the deciding of many causes and questions, as for warranties, actions, conditions, waivers, suspensions, and divers other provisoes."

A use in esse.

(3.) The statute requires, that there should be a use *in esse* in possession, reversion or remainder. That use may be either expressed or implied.

Of express uses, and by what words created.

First; *Of express uses*. As the statute mentions the words *use*, *trust*, and *confidence*, it executes the possession to the use, whether it be expressed by any of those words. Thus, if lands be conveyed to A. and his heirs in trust for B. and his heirs, or in trust

▪ Bac. uses, 64.

▪ Ibid. 65.

that

that he and they shall take the profits, the legal estate is vested in B. by virtue of the statute^x. And here observe, that upon the execution of every use by the statute, cestuique use shall have the legal estate, *after such quality, manner, form, and condition, as he had before in or to the use, confidence, or trust, that was in him*^y.

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Besides the words mentioned by the statute, the word *intent* will raise a use^z. Thus a man made a feoffment in fee, *sub conditione, ea intentione*, that his wife should have the land for life, with remainder to his younger son in fee; the feoffor died, and also the feoffee, without having made any estate. The heir of the feoffor entered as for a condition broken; but it was resolved, that this was no condition, but an estate executed presently by the statute, according to the *intent* of the parties^a. So if it appears, that

^x Eure v. Howard, Prec. cha. 345. Broughton v. Langley, 2 Salk. 679.

^y See upon these words, Bac. uses, 47.

^z Hummerston's case, Dyer, 166. a. in notis. Betnam v. Bateson, ibid. and 4 Leon. 22.

^a Anon. 4 Leon. 2. pl.

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the parties intended to create a use, though that intention be not expressed by the word *intent*, or by any other of an express fiduciary import, yet the use will be executed by the statute. Therefore in a case^b, where A. made a feoffment in fee, and accompanied it with a deed of defeazance or declaration, which gave the feoffor and his heirs a power of entry after quiet enjoyment by the feoffee for 100 years; it was held by the judges, after the term had elapsed, that the lands were vested in the heir of the feoffor by the statute 27 Hen. 8.; for that it appeared to be the *intent* of the feoffor, that he should have the lands after the 100 years possession by the feoffees. This *intent* was the *use* of the feoffment, which arose out of the possession of the feoffees, and was executed by the statute of uses^c.

It has been said, that if A. (the grantor) be entitled to a remedy at common law by an action of covenant in order to compel B.

^b Boydell v. Walthall, Moor, 722.

^c See Callard v. Callard, Cro. Eliz. 344.

Roll. ab. 788. Moore, 687, and 4 Term. Rep. 219.

(the grantee) to execute estates; there, as no subpœna will lie for A, as *cestuique use* against B, so no use can be executed in A. by the statute.*

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Secondly. *Of implied or resulting uses.* As the statute did not expressly abolish all future limitations of, and estates created by, uses, there was actually no avoiding the execution of uses, limited or occasioned by conveyances made subsequently to the act. When a feoffment was made without consideration and declaration of the use, what construction was to be adopted? We have seen, that, before the act, the chancery, which judged according to the intention of the parties, would have construed the *possession* to be in the feoffee, and the *use* in the feoffor. Does the statute destroy this construction? On the contrary, the case appears to come directly within the meaning of it; the words being *that where any person, &c. stands seised to the use of*

Of implied or resulting uses.

* See Wingfield v. Littleton. Dyer, 162. a. see post. 6th subdiv. of this Sec.

another,

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another, by reason of any feoffment, &c. or *by any manner of means whatsoever*, then, &c. In this case, the feoffee stands seised to the use of another, viz. the feoffor, by an admitted construction before the act. The act certainly did not intend to alter the manner of raising uses; nor did it mean to make any thing pass by a conveyance, which did not pass before; that is to say, it did not mean, that the *land* and *use* should now pass in a case, in which the *land* only passed before the statute^f. It may therefore be considered as a general rule, that if a feoffment be made, a fine levied, or recovery suffered without consideration and declaration of the use, the use will result to the feoffor, &c. and be executed in him by the statute^g.

Indeed it is said^h, that if a feoffment be pleaded, the use need not be averred to the

^f Vide 2 Raym. 800. 2 Roll. ab. 781. Read Co. Litt. 22. b. Jenk. v. Errington, Cro. Eliz. cent. 253. 321.

^g Armstrong v. Wolsey, 2 Wils. 19 Doug. 26. Beckwith's Case, 2 Co. 56, 58. b. Dyer, 146. b. ^h Shortridge v. Lamplugh, 2 Salk. 678. 7 Mod. 71. 1 Stra. 107.

feoffee;

feoffee; because if nothing appear to the contrary, the use must be intended to be in him; and that such was the form of pleading *before* the statute. If this be the course of pleading, it may be asked, what utility can arise from the doctrine of resulting uses? To which it may be answered, that though the rules of pleading do not require an averment of the use in favour of the feoffee, yet it may be averred to be in the feoffor; and that the want of a consideration and declaration of the use is a sufficient circumstance to prove, that it was intended for him¹.

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I must here observe, that uses generally result according to the estate and interest of the person or persons making the conveyance^k; and he or they, in that case, claim under the old use. However, when a tenant in tail suffers a recovery without consideration or declaration of the use, the use (notwithstanding the aspect of some of the

¹ *Anglesea v. Altham*.
Holt, Rep. 737. 1 Stra.
107.

^k See ante Ch. I. S. xi.
(3.) and *Roe v. Popham*.
Doug. 24.

cases)

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cases¹⁾ will result to the *recoveree* in *fee*^m; for as the recoveror or demandant acquires a seisin in fee, the use, if it result at all, must result according to the extent of that seisin; the words of the act being, that the *estate, title, right, and possession* of the person seised to the use shall be transferred to the *cestuique use*; and in the very distinguished argument of the chief justice *Lee*, in delivering the opinion of the court in the case of *Martin v. Strachan*ⁿ, is the following passage; "It is the use of the *fee simple* that passes to the recoveror from *tenant in tail*, and which results to *him* (i. e. tenant in tail) and *his heirs*, if no use is declared^o."

The preceding observations are made upon the case of a feoffment or other conveyance without consideration, and without the declaration of *any part of the use*. The

¹ See *Argol v. Cheney*, Latch. 82. *Waker v. Snow*, Palm. 359.

^m 9 Co. 8. b. *Gilb. uses*, 61. *Nightingale v. Ferrers*, 3 P. W. 206.

ⁿ 5 Term. Rep. 107. 110. in note.

^o See post. as to the effect of a declaration, or the want of one, in breaking the descent. Sec. 7.

law equally favours a resulting use upon a conveyance, where only part of it is limited, and the remainder left undisposed of; it being a rule, that so much of the use, as a man does not dispose of, remains in him^p. Thus, if a feoffment in fee be made to the use of the heirs of the body of the feoffor, the use is undisposed of during his life; it will therefore result, and then he will have an estate tail executed in him^q. So if the use upon a feoffment in fee be declared to the feoffee for life, and no further declaration be made, the remainder of it will result to the feoffor^r; or if the use in the first instance be limited to the feoffor in tail without any further declaration, the use in reversion will result to him^s; but not so, if the use be limited to the feoffor for life or for years; because if it did, the feoffor could not have an estate for life or years, as he intended^t.

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It is the intention of the parties, to be

^p Co. Litt. 23. a.
Woodliff v. Drury, Cro.
Eliz. 439. Audley's case,
Dy. 166. a.

^q 1 Mod. 161. 162. 1
Roll. Rep. 240.

^r See next page and 1
Vef. 488.

^s Vide Dy. 111. b. in
notis.

^t Ibid: Adams v. Sa-
vage, 2 Salk. 679.

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collected from the face of the deed, that gives effect to resulting uses. Therefore, it has been said, that the payment of 5 s. or the like, serves as an implied declaration of the use to the feoffee, when it is not otherwise expressly disposed of. On the contrary, the want both of consideration and declaration shews, that the feoffor never intended to part with the use. This has been the construction, when no part of the use has been expressly limited. But the same rule does not hold, as I have already stated, where any part of the use is limited *from* the feoffor, &c. and the residue left undisposed of: for the express declaration in this case is a presumptive proof, that he did not mean, that the grantee should have the remainder of the use. Therefore if an estate be granted even for a *valuable* consideration to feoffees and *their heirs*, to the use of them for their *lives*, it should seem, that the remainder of the use will result to the grantor^u.

^u See Wilkes v. Leu-
son, Dy. 169. Wilkins
v. Perratt, Moor, 876.
Piers v. Hoe, Cro. Eliz.
131. 1 Leon. 125.—

Booth's opinion cited *sup*.
See more of resulting uses
post. sec. 5th; subdivi-
sions 2d and 5th.

The statute of frauds, 29 Car. 2. c. 23. by an express saving, does not extend to trusts and confidences, that arise or result by implication of law. It has however been said, that as a use now becomes a *legal* estate by the operation of the act, that clause is not applicable to it ^x.

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It has been determined, that a resulting use may be rebutted by parol evidence ^y. But neither the grantor nor grantee can aver a use to a third person since the statute ^z.

(4.) By the words of the statute every species of real property (except copyhold estates ^a), whether corporeal or incorporeal, in possession, reversion, or remainder, may be conveyed to uses. The property however must be *in esse* at the time of the creation of the use. Therefore if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses; no use can arise by virtue of such covenant upon

An hereditament.

^x Lamplugh v. Lamplugh, 1 P. W. 112.

^y Roe v. Popham. Dougl. 26.

^a 2 Salk. 676.

^z See post. sec. 8.

lands,

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lands, of which he may afterwards become the purchaser^b. So if A. convey his lands by bargain and sale to J. S. in fee, with a way over them; the right of way does not pass^c: because by the operation of the *bargain and sale* the use is first vested in the bargainee; and consequently there is no previously existing seisin of the right of way, out of which the use can arise. But the grant of a rent-charge *de novo* to uses is within the statute^d: because the land is the seisin, out of which it arises.

There must be a seisin in the feoffee or grantee.

(5.) In order that a use may be executed by the statute, there must be a seisin in the feoffee or grantee at the time of its execution: for as Lord Bacon has observed^e, “the matter and substance of the estate of *cestuique use* is the estate of the feoffee, and more he cannot have.” When a feoffment is made to A. and his heirs, to the use of B. and his heirs, or to the use of B. for life, with remainder to the use of C. in fee; here the seisin of A. is entire,

^b Yelverton v. Yelverton. Cro. Eliz. 401. Moor, 342. 2 Roll. ab. 790.

^c Beaudley v. Brook, Cro. Jac. 189.

^d Bac. uses, 43.

^e Bac. uses, 47.

and

and upon the execution of the conveyance it is immediately transferred from him according to the limitation of the use. This kind of seisin I shall, by way of distinction, call an *actual seisin*. There is likewise, what is termed, a *possibility of seisin*, or *scintilla juris*.

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Of an actual seisin coextensive with the estate.

If a seisin in fee be properly created, that seisin will serve uses declared thereupon, though the person, who created it, had not an estate in fee-simple in the lands conveyed. Thus when a tenant in tail suffers a recovery, the use may be declared in fee^s: and

^s Dy. 186. a. Vaugh. 49. Bac. uses, 47. Cro. Car. 231. 3 Bulst. 184.

See Crawley's case, Cro. Eliz. 721.

^s See ante, 107.

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if a tenant for life or years make a feoffment in fee, and the use be declared in fee, such use will be executed according to the extent of the tortious seisin acquired by the feoffment^b.

Of the possibility of seisin.

Secondly. *Of the possibility of seisin.* The

scintilla juris, or possibility of seisin, is supposed to exist in *feoffees*, *releasees*, &c. to uses, when all actual seisin is taken from them by the operation of the statute, in two particular cases: first, upon the limitation of springing uses: 2dly, upon the creation of contingent uses. I shall in this place speak of springing and contingent uses, so far only as they will explain the nature of the *scintilla juris*; leaving a fuller discussion of the learning respecting them to a subsequent part of this work.

First then, if a feoffment or lease and release be made, a fine levied, or recovery suffered to A. and his heirs, to the use of B. and his heirs, until C. pay a sum of money, and then to the use of C. and his heirs; in this case the use is executed in B.

^a Co. Litt. 10. a. 180. b. 183. a.

and

and his heirs by the statute; and as this use is co-extensive with the seisin of A., there can be afterwards no *actual* seisin remaining in him: but when C. pays the money, the former use to B. ceases, and a new use springs up, and is executed in C. in fee. The question is, out of whose seisin is the secondary use to be served? It cannot be served out of the possession of B., because he is *cestuique use*; nor out of the original seisin of the feoffor, &c.; because the livery, &c. entirely divested him of all possession whateverⁱ. Neither could the use to C. be executed until payment of the money; because the *two* uses could not exist at the same time^k. To avoid these difficulties, it was said, that the use should arise out of the original seisin of A. the grantee; that tho' no actual seisin remained in him after the execution of the use to B., yet upon the cesser of the use limited to B., the original seisin reverted to A. for the purpose of serving the secondary use to C.; and that before the money was paid, this possibility of reverter of the original seisin should be considered as a *possibility of seisin* or *scintilla juris*.

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ⁱ Vide 1 Leon. 269.

^k Co. Litt. 271. b.

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2dly. A feoffment is made to J. S. in fee, to the use of A. for life, remainder to the use of his first son *unborn* in tail, with remainder to the use of B. in fee. Does any and what seisin remain in J. S. until the birth of a son of A.? The solution of this question formed the great difficulty in Chudley's case¹. On the one hand it was said, that an *actual* estate in remainder vested in J. S. to serve the contingent use, when it came *in esse*; whilst others were of opinion, that no part of the original seisin remained in J. S., and that the contingent use, when it should arise, must be served out of the former seisin of the grantee: that is to say, that as the whole seisin was taken out of J. S., so much of it as was necessary to serve the contingent use, when it came *in esse*, should remain in the preservation and custody of the law, and should not return to, or re-vest in, him. But both these opinions were erroneous: for with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate, until that limited to the son should

¹ See the case post, f. 8.

arise;

arise; besides if J. S. had a vested estate in remainder, he might enter for a forfeiture, and punish waste, &c. and it is clear, that the parties intended him no such benefit. With respect to the second notion, it was certainly against the words and meaning of the statute, which requires the grantee to be seised *at the time of the execution of the use*. But the true construction appears to be, that J. S. has not an actual estate or seisin during the suspense of the contingency; nor is the whole seisin taken from him; but that the possession is executed according to the limitation of the uses; that as a new use will arise upon the birth of A.'s son, so as to precede the limitation to B., so upon that event a seisin, co-extensive with the estate in use limited to such son, will vest in J. S. for the purpose of serving it: and that until the contingency happens, J. S. has a mere possibility of seisin, which may never become actually vested in him.

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(6.) The words of the statute expressing the conveyance or deed, by which the use is created, are these, "bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by

By what conveyance the use may be raised.

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"any manner of means whatsoever".^m Notwithstanding the generality of the above words, in order to raise a use by the statute, there must be either a direct or actual conveyance, operating by way of transmutation of possession, or a contract or covenant, operating as a *bargain and sale* or a *covenant to stand seised to uses*: for as to *contracts* and *agreements*, which are merely referrible to actual conveyances, they certainly do not raise uses under the statuteⁿ. Thus^o, where T. S. by indenture covenanted and granted, in consideration that A. B. had conveyed divers lands and tenements to him in fee-simple after the death of the said A. B., that he the said T. S. would levy a fine to conuzees of other lands; by which fine the said other lands should be assured to the said T. S. for life, remainder to the said A. B. in tail; and no fine was levied: it was determined, that the covenant to levy a fine did not of itself change or raise a use.

^m It seems, that there may be a surrender to a use. Cro. Eliz. 688.

ⁿ See Hore v. Dix.

¹ Sid. 25. Petfield v. Pearce, ² Roll. ab. 789.

^o Bainton's case, Dy. 96. a. Shep. Touch. 82.

In another case ^p, A. by indenture covenanted, that she would assure lands by recovery to B. (her son-in-law) to and for such uses, as in the said indenture should be afterwards declared. B. covenanted, that within eight months after the assurance made, he would make an estate to A. for life, remainder to B. and C. his wife in tail, remainder over in fee. The recovery was suffered accordingly; but no further declaration of the uses was made in the said indenture; nor were the estates conveyed by B. pursuant to his covenant. It was held, that neither the recovery, nor covenant by B. could change or declare the use, so as to execute it in A. for life, &c.; and that it could not result to A. in fee: because as she had her remedy against B. at common law by an action of covenant, no *subpœna* would lie to compel him to execute the estate. The construction in this case, respecting the resulting use, was occasioned by the covenant on B.'s part, as appears by Audley's case cited below.

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^p Wingfield v. Littleton, Dy. 162. a. See also Audley's case, ibid. 166. a.

SECT. II.
Of the circumstances necessary to the execution of a use by the statute.

So¹ where A. seised in fee covenanted with B. in consideration of a marriage to be had between J. S. and J. D., that certain lands should from and immediately after the death of A. *remain* unto the said J. D. and J. S., and to the heirs of the said J. D.; to the only use of the said J. D. and J. S. and the heirs of the said J. D. The marriage took effect, but no use was raised by virtue of the covenant; it not being a covenant *to stand seised*, but merely that the lands should *remain*.

By more modern resolutions, it has been determined, that articles, entered into before marriage, to *settle* lands to certain uses, do not alone raise the uses; but in order thereto, that an actual conveyance is necessary². This principle was adopted in its fullest latitude in the case of Trevor v. Trevor³. There A. in consideration of an intended marriage, covenanted with trustees before

¹ Buckler v. Symons,
² Roll. ab. 788. 1 Sid.
26.

man, 2 P. W. 436, 439,
447.

³ 1 P. W. 622. 1 Eq.

⁴ See Edwards v. Free-

ab. 387.

the end of two years to settle and assure lands upon the said trustees, to the use of himself for life, without waste, remainder to the use of his intended wife for life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male lawfully issuing, remainder to his own right heirs: and A. covenanted, that in case the uses therein were not thereafter well raised according to the meaning of the articles, then he and his heirs would *stand seised* of the premisses, until such time as a farther assurance should be made thereof, *to the uses mentioned in the articles*. No settlement was made pursuant to the articles, and several years afterwards A. and his wife levied a fine of the same lands to other uses. The Lord Chancellor considered the whole of these articles as in their nature *executory*: and, among other things, observed, that the covenant to stand seised in the latter end of them, could not be taken as a final settlement from the words of it; and that the precedent part of them were provisional only, viz. to stand seised till a settlement should be made.

SECT. II.

Of the circumstances necessary to the execution of a use by the statute.

III. HAV-

SECT. III.

As to the effect
of the union of
the use and pos-
session.

III. HAVING considered the several circumstances necessary to the raising and execution of uses by the statute; I shall now state the effect of the transfer of the possession to the use by the statute, as between the feoffee, &c. and the cestuique use.

In respect to the
feoffee, releasee,
&c.

1st. *As to the estate of the feoffee, &c.* It is very obvious, that as the statute has made the estate of cestuique use a legal instead of an equitable one, and entirely divested the feoffees, releasees, &c. of all estates whatever, most of the incidents, which attended the use in its fiduciary state, are now at an end. With respect to the feoffee, he has no interest at all in the land; and therefore on his account, it cannot escheat, nor be forfeited; nor is it subject either to dower or courtesy on account of his momentary seisin^a. However, as the statute only transfers the legal estate to the use, it does not interfere with the title deeds: and therefore it is a point, which appears to me to be clearly settled, that the feoffee or grantee to uses is entitled to the custody of them^b. Upon this

The grantee
entitled to the
possession of
title deeds.

^a See 2 Comm. 333.
Sneyd v. Sneyd, 1 Atk.
443.

^b *Elliston v. Vaughan*,
Dyer, 277. a. *Stock-*
man v. Hampton, Cro.
Car.

this account, it has been repeatedly determined, that a *profert* is not necessary in pleading a gift under the statute of uses^c.

SECT. III.

As to the effect of the union of the use and possession.

2ndly. *But as to the estate of cestuique use*, it is subject to escheat, to courtesy, dower, and all the incidents to which a legal estate is liable^d.

Rents conveyed or limited to uses are executed by the statute; and cestuique use is thereupon entitled to all remedies and rights relative thereto; but not to *collateral* rights^e.

IV. I PROCEED now to explain, in what respects legal estates created, or uses executed, by the statute, correspond with the rules of the common law.

SECT. IV.

Of limitations of uses which agree with the rules of the common law.

And first, with respect to the limitation of estates *in fee*.

Car. 441. Huntington v. Mildmay, Cro. Jac. 217. Reynell v. Long, Carth. 315. Whitfield v. Fauſſet, 1 Ves. 387. 394.

^c See cases *supra*, and 3 Term. rep. 156.

^d See 2 Comm. 333.

^e Boscawen and Herle v. Cooke, 1 Mod. 223. 2 Mod. 138. S. C.

It

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of uses which
agree with the
rules of the com-
mon law.

As to estates in
fee simple.

It seems to be settled, that the same words, which are necessary to create an estate in fee upon a conveyance at common law, are equally necessary upon a conveyance to uses since the statute. It is true, that if before the statute, a man had bargained and sold his lands for a valuable consideration, without having limited the use to the heirs of the bargainee, chancery, which considered the intention of the parties, would have decreed an estate *in fee*^a. But as the statute now executes the use, and the bargainee has a legal estate, the same construction must be had upon this legal estate by the statute, as upon estates by the common law; and, therefore, in the case put, the bargainee since the statute, can only have an estate for life^b. So it seems, that if a feoffment be made to the use of B. and his *heirs male lawfully engendered*, as this limitation would at common law have created an estate in fee simple, so it will upon a conveyance to uses^c.

(2.) It is a rule generally established, that the word *heirs* is necessary to create

^a 1 Co. 100. b.

^b Corbet's case, *ibid.*
87. b.

^c Abraham v. Twig,
Cro. Eliz. 478. note 2.
Har. Co. Litt. 20. b.

an *estate tail* upon a conveyance at common law^d. The same law holds with respect to a deed operating by way of use. Therefore, if a feoffment be made to the use of J. S. and the *issue* or *issue male* of his body, this limitation cannot raise an estate tail in J. S.^e In the case of Leigh v. Brace, a feoffment was made to A. and B.^f, and their heirs, to the use of W. B. for life, with remainder to the use of T. B. and his heirs for ever; and for default of *issue* of the body of T. B., remainder over. It was adjudged, that T. B. took an *estate tail*. This case, however, cannot be considered as an authority against the rule just alluded to: for first, as the limitation was to T. B. and his *heirs*, the subsequent words, *in default of issue of the body*, were only intended to explain the extent of the preceding limitation, or what particular class of *heirs* should take, viz. *heirs of the body*. In this view, I take it, that the same limitation would have created an estate tail

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^d Co. Litt. 20. a. 2 Fletcher, Com. rep. 457.
Inst. 334.
^e Nevel v. Nevel, 1 337. 1 Ld. Raym. 101.
Roll. ab. 837. 1 Brownl. Rep. temp. Holt. 668.
152. Makepeace v. 5 Mod. 266.

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mon law.

at common law^g: and it is observable, that none of the reporters of this case (except Carthew) mention, that it was determined upon the principle, that limitations in a conveyance, operating by way of use, should be construed in a different manner from mere common law conveyances. 2ndly. Supposing the case to have been adjudged upon the principle affirmed by Carthew, yet the subsequent case of *Makepeace v. Fletcher*^h must have established the doctrine laid down in *Nevel v. Nevel*.

(3.) Whether words *regulating* or *modifying* an estate created by a deed, operating by way of use, shall be construed in a different manner when applied to a common law conveyance, is a point not fully settled. Lord Hardwicke, in a case, where the question was, whether the words, *equally to be divided*, would create a tenancy in common, in a deed operating by way of use, observed, that though *limitations* in a deed to uses could have no greater latitude than in common law conveyances, yet

^g See Perk. f. 171. 173.
Year Book, 19 Hen. 6. 74.
per Vampage. Co. Litt.

21. a.

^h Com. Rep. 457.

as to words of mere *regulation* or *modification* of the estate, he saw no harm in giving them a reasonable construction to answer the intention; and he accordingly held, that those words created a tenancy in commonⁱ: on the other hand, Lord Thurlow, in a case nearly similar^j, expressed himself thus: "The question is, whether *deeds to uses*, in the nature of wills, should be construed so widely as wills have been? I should be sorry to give into this; for I think no good has been done by the wide construction of wills."

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O limitations of uses which agree with the rules of the common law.

(4.) It is a maxim of law, that a condition or limitation annexed to an estate ought to destroy the *whole* of the estate, to which it is annexed, and not a *part* only of it^k. This rule is applicable to limitations by way of use, which operate so as to defeat or avoid estates: therefore, if an estate be limited to the *use* of J. S. *in tail*, with a proviso, that if he do such an act, his estate shall cease *during his life*, this proviso is ut-

ⁱ Rigden v. Vallier, 2 Ves. 252. 257. 3 Atk. 731. See also Goodtitle v. Stokes, 1 Will. 341. and 2 Vent. 365.

^j Stratton v. Best, 2 Bro. Cha. rep. 223.

^k 1 Co. 86. b. 4 Burr. 1941. Litt. f. 720, 721, 722, 723.

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terly void¹. It was agreed, that lands should be limited to the use of H. C. and the heirs male of his body, with divers remainders over, and with this proviso, "That if the said H. C. or any of the heirs males of his body should attempt or make any feoffment, &c. that *his estate* should cease, *as if he was dead*, and that then the said W. B. and the other feoffees, and their heirs, should stand seised to the use of such person to whom it ought to descend or remain by the said deed intended, as if he was dead, with the remainders over as aforesaid." The proviso was considered repugnant and void^m. However, as a condition may be annexed to an estate tail to determine it *wholly* by the re-entry of the donor or his heirsⁿ, so a limitation by way of use may enure to defeat an estate tail, as if tenant in tail were dead, *without heirs of his body*^o. This doctrine has given rise to the introduction of

¹ 1 Co. 86. b.

Moor, 470.

^m Cholmley v. Humble, cited 1 Co. 38. a. See Corbet's case, *ibid.* 83. b. Mildmay's case, 6 Co. 40. a. Tarrant's case,

ⁿ Litt. f. 362. Croker v. Trevithin, Cro. Eliz. 35. 1 Leon. 292.

^o Vide Mary Portington's case, 10 Co. 36.

two species of powers or provisos in modern practice. The one is adopted in a settlement of estates, where it is intended, that the person in possession of them, under the settlement, should use the name, and bear the arms of the settlor; and in case of refusal or neglect, that the uses and estates thereby limited shall cease and determine, as if the person so refusing or neglecting, being tenant for life, were dead, or, being tenant in tail, were dead without issue, inheritable under the intail^p. The other proviso is used in settlements, for the purpose of defeating the estate of a tenant in tail, in case he shall become entitled to a certain other estate; and thereupon limiting or shifting the use to another person, as if such tenant in tail were dead without issue^q.

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Of limitations of uses which agree with the rules of the common law.

(5.) Another maxim is, that a man cannot make a fraction in an estate, in the case of a limitation by way of use, which cannot be done in a conveyance by livery

^p See the form of such power, Butl. note, 2 Co. Litt. 327. a. and 2 Bridg. Con. 8. 10. 469. 575.

^q See Appendix 1.
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1 Bridg. Con. 304. also Nicolls v. Sheffield, 2 Bro. cha. ca. 215. Doe v. Heneage, 4 Term. rep. 13.

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in possession. Therefore, Walmesley', justice, said, "If a man makes a feoffment in "fee of land to the use of A. and his heirs "every Monday, and to the use of B. and "his heirs every Tuesday, and to the use "of C. and his heirs every Wednesday, these "limitations are void, for we do not find "any such fractions of estates in law."

Uses cannot be limited so as to abrogate the law.

(6.) It only remains to observe, that the statute executes no limitation of a use, which, if executed, would be fraudulent, and thereby abrogate the law. Thus, if there be a limitation to the use of A. and his heirs, provided that if he give a mortal blow to any person, the use shall cease as to him, and remain over; this is fraudulent to prevent an escheat, and therefore void'.

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Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Of uses limited to, and legal estates vested in the grantor by his own conveyance,

V. HOWEVER in some cases the manner of creating and limiting estates has undergone considerable alterations since the introduction of conveyances to uses. Thus it was *prima facie* absurd, that a man should make a conveyance or give posses-

' 1 Co. 87. a.

' Moor, 633. 3 Atk. 180.

sion by livery of seisin to himself; and therefore if a feoffment had been made to a stranger and the feoffor, the stranger took the whole^a. But now, if a feoffment be made to the use of the feoffor, or to the use of the feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone in the first instance, and in him and the stranger in the second. As this manner of limiting the use to, and thereby vesting the legal estate in, the feoffor, releasor, &c. by one and the same conveyance, is quite contrary to the simple mode of conveyancing adopted by the common law, so is it much the more convenient and far the least expensive method. Thus for example it very frequently happens, that upon the death or removal of trustees, it becomes necessary to fill up their number pursuant to a power for that purpose usually introduced into settlements of real property. In order to effectuate this, it is now the practice for the old trustees to make a conveyance, which operates by way of transmutation of possession (generally by lease and release) unto the new trustees and their

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of legal estates
by the statute,
which differ
from the rules of
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^a Perk. f. 203.

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heirs, to the use of the old and new trustees and their heirs^b. Without the assistance therefore of the statute of uses, it would have been necessary in the above case, that the old trustees should have first enfeoffed A. B., who would have re-enfeoffed the old and new trustees jointly; thereby making two conveyances necessary. Indeed in the case of terms of years and other personal property, two assignments are still required for the above purpose^c.

As a man could not at common law convey to himself, so neither could he make a conveyance to his wife^d; but by limiting a feisin to the feoffee, releasee, &c. he may declare the use to his wife, which use will be executed by the statute^e.

This method of vesting the legal estate in the grantor by his own conveyance can be effected by a feoffment, fine, recovery, or lease and release; for in each of

^b See precedents, 1 Horfm. 319, 334 to 343.

^c See a precedent, 1 Horfm. 303 to 307.

^d Co. Litt. 3. a. 114.

^e *Moyse v. Gyles*, 2 Vern. 385. *Lucas v. Lucas*, 1 Atk. 271. note 2. last ed.

^f Co. Litt. 112. a.

these,

these, the seisin is first given to the feoffee, &c. and that seisin is sufficient to serve uses declared to the feoffor, &c. or to any other person. But in a bargain and sale, where the use first passes, and then the possession is executed in the bargainee by the statute, no other use can be declared upon his estate; according to the rule, that a use cannot be limited to arise out of a use^f. And yet a man may covenant to stand seised to the use of himself.

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of legal estates
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the common law.

(2.) By the common law a man could not make his own heir a *purchaser*, even of an estate *tail*^g. This maxim was indeed a necessary consequence of the preceding rule, that a man could not convey, nor limit a remainder, to himself; for *filius est pars patris*^h—*heres est pars antecessoris*ⁱ. Therefore if a gift had been made in tail or for life, with remainder to the heirs male of the body of the grantor, this remainder would have been void^k. But since the

Of uses limited
to the heirs of
the body of the
grantor, so as to
take by descent
or purchase.

^f Dyer, 155. a. b. 9. pl. 20.

^g Co. 136. b. 137. a.

ⁱ Co. Litt. 22. b.

^h Co. Litt. 22. b.

^k Greswold's case, Dy.

^a Moor, 720. Dyer, 156. a.

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introduction of uses, a man may limit the use, so as to make his heirs *special* take either by *purchase* or by *descent*. Thus, if J. S. make a feoffment to A. in fee, to the use of himself for life, with remainder to the use of the heirs of his body; this is a good estate tail executed in J. S.¹ So if the use be limited to A. for life, with remainder to the heirs of the body of J. S., in this case also the heirs of the body will take by *descent*^m: for as the limitation to A. for life may determine during the life of J. S. (the grantor), the law implies a use in J. S. for life, expectant upon the determination of the estate of A.; according to the principle, that so much of the use as is not disposed of, results to the grantor; and this implied estate in J. S. for life in remainder, is sufficient to consolidate with the limitation to the heirs of his body; pursuant to the rule, that where there is a limitation to the ancestor for life, with a limitation to his heirs, or heirs of his body, in the same conveyance, the heirs, or heirs of the body, do not take by *purchase*, but by *descent*ⁿ. But

¹ Co. Litt. 22. b.

687.

^m See Wills v. Palmer,

5 Burr. 2615. 2 Black.

ⁿ See Fearn, 54, to

62. 4th ed.

if a feoffment be made to the use of A. and his heirs *during the life of the grantor*, with the remainder to the use of the heirs of the body of the grantor; as the use is expressly limited away during the life of the grantor, there can be no *implied* estate in him so as to consolidate with the limitation to the heirs of his body, and therefore his issue must in that case take by *purchase*°.

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But here notice, that a grantor cannot even under a conveyance, which operates by way of *use*, make his heir *general* a purchaser: but in cases where the limitation is to the right heirs of the grantor, the use, so limited, is construed to be the *old* use, and will be executed in him as the *reversion in fee*, and not as a *remainder*°. Thus if a fine be levied to the use of the wife of the conuzor for life, remainder to the use of another in tail, remainder to the use of the right heirs of the conuzor; the last limitation of the use is void as a *remainder*; for the *old* use of the fee continued in the grantor as a *rever-*

° Tippin v. Cofin, 387. See Fearn, 62.
Carth. 272. 4 Mod. 380. ° See 1 Co. 129. b.
Elfe v. Osborn, 1 P. W. 130. a.

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of legal estates
by the statute,
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*son*⁹. So where a feoffment was made to the use of the feoffor for 40 years, without impeachment of waste, and afterwards to the use of C. his second son in tail male, with remainder to the use of the right heirs of the feoffor; it was determined, that the use limited to the right heirs was the *old* use; that it was void as a *remainder*, and was merely the *reversion*¹.

Lord Bacon has observed, “ that the
“ very letter of the statute doth take no-
“ tice of a difference between an use in
“ *remainder* and an use in *reverter*; which
“ though it cannot be properly so called,
“ because it doth not depend upon parti-
“ cular estates, as remainders do, neither
“ did they before the statute draw any te-
“ nures, as *reversions* do; yet the statute
“ intends, that there is a difference, when
“ the particular use and the use limited
“ upon the particular use, are both *new*
“ uses; in which case it is a use in *remain-*

⁹ Fenwick v. Mitford, case, Moor, 718. 1 Co. Moor, 284. 1 Leon. 182. 130. a. Cro. Eliz. 334. Co. Litt. 22. b. Read v. Har. Co. Litt. note 3, 22. Errington, Cro. Eliz. b. Bingham's case, 2 321. S. C. Semb. Co. 91. b.

¹ Earl of Bedford's

“ *der*;

" *der* ; and where the particular use is a
 " new use, and the remnant of the use is the
 " old use, in which case it is a use *in re-*
 " *verter* '."

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 uses and creation
 of legal estates
 by the statute,
 which differ
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 the common law.

(3.) Again: by the common law, generally speaking, no person could take a present interest by the *habendum* of the deed, who was not named in the premises¹. But in a case², where A. enfeoffed B., *habendum* to the said B. and C. their heirs and assigns, to the use and behoof of the said B. and C. their heirs and assigns; it was resolved, that as C. was not named in the premises, he could take no *possession* originally by the *habendum*; and that the livery, made according to the intent of the indenture, did not give any thing to C., because as to him it was void: but though the feoffment did not give any *seisin* to C., yet it did to B. and his heirs, which *seisin* was sufficient to serve the use declared to C. Therefore the use limited to B. and C. was good,

Of limiting the
 use by the *habendum* to a person not named in the *premises*.

¹ Bac. uses, 45, 46.

² 2 Roll. ab. 67. Hob.

313. note 4. Har. Co.
 Litt. 26. b.

³ Samme's case, 13

Co. 55. See as to an
exception after an estate
 limited by way of use.
 Tregmiell v. Reeve,
 Cro. Car. 437.

and

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and the statute executed it. But this limitation of the use in a bargain and sale to a person not named in the premises, after a previous disposition of it to the bargainee, would be void, for the reasons before mentioned.

Of uses limited
to two, the one
being incapable.

(4.) So it is a rule of law, that if an estate be limited to two, the one being capable, and the other incapable, at the time of the grant, he who is capable shall take the whole^w; and that *joint tenants* cannot take at different periods^x. But since the introduction of uses, if A. make a feoffment in fee, to the use of B. and his wife, that shall be; though the whole estate vested in B. at first, yet upon his marriage the wife shall take jointly with him^y. So if a disseisin be had to the use of two, and the one agrees to it at one time, and the other at another, they shall be *joint-tenants*^z.

Of uses limited
in futuro, and
to persons not in
esse, where no
particular estate
is expressly li-
mited.

(5.) No estate of freehold can by the common law be granted to commence

- | | |
|-----------------------------------|--------------------------------|
| ^w 1 Co. 100. b. 2 | Co. 101. a. Samme's |
| 13 Co. 57. | case, 13 Co. 57. See |
| ^x Co. Litt. 9. a. 188. | Wells v. Fenton, Moor, |
| a. 2 Roll. ab. 417. pl. 8. | 634. |
| ^y Mutton's case, Moor, | ^z Co. Litt. 188. a. |
| 96. Dyer, 274. b. 1 | 13 Co. 57. |

in

in futuro^a; neither can a contingent remainder be supported without an express particular estate of freehold. Therefore, if a grant be made to B. and his heirs to commence four years after the grant, or to A. for years, with remainder to the right heirs of J. S. who is living^b, in either case the grant is void. But if a conveyance be made to J. S. for life, with remainder to the first son unborn, or right heirs, of J. D.; or if a feoffment and livery be made to J. S. for ten years, with remainder to J. D. and his heirs; in these cases the intervening estates are certainly sufficient to support the remainders limited thereon. Now in conveyances to uses, the courts, in order to support limitations, when no particular estate is created, have generally made a particular estate by implication^c. Thus, if a man covenant to stand seised to the use of the heirs of his own body^d, or to the use of another after his own death^e, or if he bargain

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Of limitations of uses and creation of legal estates by the statute, which differ from the rules of the common law.

^a Barwick's case, 5

Co. 94. b. 2 Vent. 204.

Roe v. Tranmer, 2 Will.

75.

^b Co. Litt. 217. a.^c See 1 Atk. 586.^d Carth. 263.^e Osman v. Sheafe, 3 Lev. 370. Roe v. Tranmer, 2 Will. 75.

and

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and sell his lands after seven years^f; in each of these cases the grant is good, and until the event takes place, the use results. But here observe, that in order to create this particular estate by implication upon those conveyances, which operate by way of transmutation of possession, it is necessary that a present seisin should be transferred in order to serve the resulting use. Thus if a feoffment or lease and release be made to J. S. and his heirs, to the use of J. S. and his heirs, to commence four years from thence, or after the death of the grantor^g, the limitation of the use to J. S. is good, for during the four years, or the life of the grantor, it will result and be executed. But if the conveyance had been to J. S. and his heirs after the death of the grantor, to the use of J. S. and his heirs; it would have been void; because it is the grant of an estate of freehold to commence *in futuro*^h.

The courts have not only countenanced resulting uses, in order to support subsequent limitations, when no particular estate

^f Bac. uses, 63.

^g See 2 Saik. 675. and the above cases.

^h Roe v. Tranmer, 2 Will. 75. Lamb v. Archer, 1 Saik. 225.

has been created; but they have also adopted the same construction, where the use, previous to the limitation, has been limited away for a term of years. Thus in the case of Penhay and Hurrell¹, lands were conveyed to trustees for 70 years, if A. should live so long, remainder to trustees for 500 years, and after the death of A. then to B. for life, and to his first and other sons in tail; it was objected, that the limitation to B. was void, it being a freehold to commence *in futuro*: for no estate for life was limited to A., and the remainder was to take effect before the determination of the term of 500 years. But the court said, that an estate for life resulted to A., which would support the limitation to B. In this case no use was limited to A. the grantor: and the declaration of it for the term of years to the trustees was no proof of an intention, that the use of the freehold should not result to A. in order to support the limitation to B. Supposing the term of 500 years had been made determinable on A.'s death, like the term of 70 years, then it seems, that there would have been no neces-

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¹ 2 Vern. 370. 2 Freem. 231, 235, 258.

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fity for an implied estate for life, resulting to the grantor; for the presumption, that A.'s life would not have exceeded the term, would of itself have supported the remainder to B. according to Chief Justice Hale's opinion, in the case of Weale and Lower^k. But the limitation to B. was not a remainder expectant on the determination of the term of 500 years; it was to take effect, according to the limitation, during the continuance of it. It appears, that if the *use* in the case of Penhay and Hurrell had been limited to A. during the term, the construction would have been different. Thus in the case of Adams and Savage^l, where lands were conveyed by lease and release to trustees, and their heirs, to the *use* of A. the *releasor* for ninety-nine years, remainder to the use of the trustees for *twenty-five years*, remainder to the use of the heirs male of the body of A.; it was determined, that no use for life resulted to A., and consequently that the remainder to his heirs male was void; there being no freehold estate previously limited to support it.

^k Pollex, 67. Fearne, 13, 15, 20. ^l 2 Salk. 679.

So there can be no resulting use to a person, who has not the lands conveyed in his own right. Thus^m where husband and wife covenanted to levy a fine of the wife's land, to the use of the heirs of the body of the husband on the wife to be begotten; they had issue, and the wife died; it was held, that the limitation to the heirs of the body of the husband was void: for the husband could not have the use for life by implication, he being a stranger to the estate.

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(6.) It is a maxim of the common law, that no estate can be limited upon a fee; or in other words, an estate in fee cannot be made to cease as to one, and take effect by way of limitation upon a contingent event in favour of another person. Thus if a feoffment had been made in fee, with a proviso to make it cease as to the feoffee, and go over to a stranger upon the payment of a certain sum, &c. this limita-

Of springing or shifting uses after or upon a limitation in fee.

^m 2 Salk. 675. Davis v. Speed. Vide other cases on this head, 1 P.

W. 359, 387. Fearne, 32, 35.

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tion was void^a. For as a remainder it could not take effect; a remainder being a *remnant* of an estate in lands or tenements expectant upon a particular estate^b: and as a condition it was void, for no person can take advantage of a condition but the grantor and his heirs^c. But it is established now beyond controversy, that limitations of the above nature may take effect by way of use.

The principle seems to have been acknowledged at a very early period. In Brooke's Abridgment^d it is admitted, that if a man make a feoffment in fee to the use of W. and his heirs, until A. pays a certain sum to W., and then to the use of A. and his heirs; the use is first executed in W. by the statute, but when A. pays the money, the use upon such payment shifts from W.

^a See Co. Litt. 18. a. Seymour's case, 10 Co. 97. b. 1 Salk. 231. pl. 9. Dyer, 33. a. 1 Co. 85. b. 10 Mod. 423. Plowd. 29.

^b Co. Litt. 143. a.

See Fearne, 8. 4th ed.

^c Doctor and Stud. Dial. 2. c. 20, 21. Perk. f. 831. Litt. f. 347.

^d Bro. fecff. al. uses, pl. 30. cites 6 Ed. 6. B. N. C. pl. 423.

and

and vests in A. But in that case (which was determined before the rule was clearly settled, that all future or springing uses must be served out of the seisin of the grantees), it was said, that to avoid all doubts A. should enter in the name of the feoffees, and in his own name.

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So where a fine was levied to the use of A. and his heirs, if R. should not pay a certain sum to A. at an appointed time, and if he should, then to the use of A. for life, remainder to the use of R. in fee; upon the payment of the money it was held, that the uses would change according to the limitation^r.

It seems, that a shifting or springing use, after a previous limitation of the *fee*, cannot be barred by the cestuique use by any kind of conveyance. Thus, if land be given to the use of A. and his heirs, until B. pay him 10 l., and then to the use of B.: A.

Whether a shifting use, after a limitation of the fee, can be barred.

^r See *Spring v. Caesar*, 1 Roll. ab. 415. pl. 12. —For other instances of springing uses after a previous limitation of the

fee, I must refer to the cases of *Harwell v. Lucas*, Moor, 99. and *Earl of Kent v. Steward*, Cro. Car. 358.

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cannot bar this contingent use^o. A contingent or shifting use in this respect differs from a contingent remainder, which may be destroyed. But on the other hand, it agrees with an executory devise after a previous devise of the fee; as it was determined in *Pells and Browne*¹. However, in another case, it was said^u, that if a man covenant to stand seised to the use of himself in fee, until marriage, and then to the use of himself and his intended wife, and the heirs of his body, with remainders over; he may before marriage destroy the future or contingent uses, by making a feoffment in fee, in tail, or for life, upon a good consideration, and without notice: but that a lease for years would be insufficient for that purpose^v.

Perhaps we may reconcile the last case to the preceding rule in this manner; if the

^o *Loyd v. Carew*, Prec. cha. 72. Pig. Rec. 134. Palm. 132. 135. Vide Bro. feoff. al uses, pl. 50. B. N. C. 137.

¹ *Cro. Jac.* 590. 1 Eq. ab. 187.

^u *Wood v. Reignold*,

Cro. Eliz. 764, 765, 854. See also *Gilb. uses*, 125.

^v See *Bould v. Wynston*, *Cro. Jac.* 168. Sed contra *femb. Barton's case*, *Moore*, 742, as to the lease for years.

feisin, out of which the springing or future use is to arise, be destroyed, the future use cannot take effect: therefore if A. covenant to stand seised to the use of such a wife, as he shall hereafter marry; until the marriage the use results to himself in fee, and it is out of his feisin, that the use to the wife must arise: now if he destroy that feisin before the use comes *in esse*, the use consequently cannot be served*. But if A. make a feoffment to B. in fee, to the use of C. in fee; but if D. pay so much money, then to A. in fee; here if C. (who has the legal estate since the statute) make a feoffment, suffer a recovery, or levy a fine, the use to A. is not barred from taking effect; because that shifting use is served out of the feisin of B. the feoffee, and not out of the estate of cestuique use. But it appears to me, that if in this case B. (the feoffee) should join with C. in making a feoffment, the feisin or *scintilla juris* of B. would be completely destroyed, and in that case no future use could arise to A. This point however

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* The case in B. N. is denied to be law, 2 C. 137, which is contra, Sid. 98.

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was not settled, though much discussed, in Brent's case^y: and yet from the principles established in the cases of Chudleigh, Wegg^z, and others^a, there can scarce be a doubt, but that the destruction of the seisin or *scintilla juris* of the feoffee would have the effect I have just mentioned.

Of shifting uses
upon or after a
previous limita-
tion in tail or
for life.

(7.) It is a maxim of the common law, that every remainder must be limited so as to await the determination of the particular estate, before it can take effect in possession^b. Therefore if an estate be limited to a person in tail, or for life, with a condition for making it cease upon an event, which may happen before its regular determination, this condition is void: for it cannot operate as a remainder for the reason just stated; and as a condition to vest the subsequent limitation by the entry of the grantor, it can have no effect; for suppos-

^y Dyer, 339. a. ^z Roll. ab. 797. pl. 16.
Leon. 14. S. C. Smith v. Warren, Cro.

^a See infra, f. 8. Eliz. 688.

^a See Woodliff v. ^b Plowd. 24. Fearne,
Drury, Cro. Eliz. 439. 9. 390. 394. Cogan v.
Poph. 76. Moor, 391. Cogan, Cro. Eliz. 360.

ing

ing the grantor to enter for a condition broken, such entry would avoid the first livery, and of course destroy the remainder, which was created by that livery. But it is now clear, that if a feisin in fee be limited to J. S. to the use of A. in tail, or for life, provided that if B. return from Rome, then the lands shall remain to the use of C. in fee; the limitation to C. will vest in abridgement of the estate limited to A^c.

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It appears to me however, that limitations of the nature just mentioned, which operate so as to determine the preceding particular estate, before its regular expiration, can be effected without the aid of springing or shifting uses, and that by a species of limitation, which is not properly a remainder, nor condition, but which is distinguished by the name of a *conditional limitation*^d: an expression and idea, as Mr. Douglas has in my opinion properly said^e, originally adopted to

Of the distinction between shifting uses and conditional limitations.

^c See 2 Leon. 16.

32, 34, 414.

^d See Reeves, 4 vol.^e Dougl. rep. 727.

509, 510. Plowd. 27,

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evade the necessity of the entry by the heir for the purpose of taking advantage of the defeazance of a prior estate. In order to distinguish between springing uses, and conditional limitations, I must observe, that where the grantor departs with the whole fee, and limits the use upon the seisin so transferred to B. in tail, or for life, until C.'s return from Rome, and then to the use of C., &c.: this limitation to C. is termed a springing or shifting use. But where the grantor only parts in the first instance with an estate less than the fee, the estate so created may be defeated by a *conditional limitation*; and upon the determination of it, the next subsequent estate immediately becomes vested without entry or claim^f. But in these cases it is absolutely necessary to make use of words of limitation; which words^g are, *quam diu, dummodo, dum, quousque, durante*; whereas words of *condition* are, *sub conditione, ita quod, si contingat, proviso*. If words of *condition* are inserted, then the particular estate cannot cease without entry by the grantor or his heirs.

^f Co. Litt. 214. b.

^g Mary Portington's case, 10 Co. 41. b.

Thus



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Thus if there be tenant for life, with remainder in fee, *upon condition* that tenant for life (being a *feme sole*) should continue unmarried, and she afterwards marry; though the heir of the grantor may enter, yet by such entry he defeats the remainder^h. But if an estate be granted to A. *so long as* she shall continue unmarriedⁱ, or to A. *for life, si tam diu in pura viduitate viveret*^k, and the remainder be granted to B.; upon the marriage of A. her estate determines by the nature of its limitation, and the remainder to B. immediately takes effect^l. So if a gift be made in tail to A. *upon condition*, that if C. return from Rome, it shall thenceforth immediately remain to B.; in this case the limitation over can never take effect as a remainder; because the estate tail cannot cease without an entry by the grantor or his heirs, which entry would defeat the remainder^m. But if a feoffment be made to A. and the heirs of his body *until* C.'s return

^h W. Jones, 58. See 155.
also Plowd. 29.

ⁱ W. Jones, 58.

^k Co. Litt. 214. b.

^l See 2 Black. Com.

^m Co. Litt. 214. b.

W. Jones 58. Plowd.

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from Rome, and after C.'s return, to be in fee; here upon C.'s return, the limitation to B. will vest ^a.

But when limitations over operate by way of shifting or secondary uses, they take effect, whether the words, which cause their taking effect, be words of *limitation* or *condition* ^o. Thus where a fine was levied to and to the use of B. in fee, *upon condition* that he should pay A. (who was the conuzor) 4l. per annum, and in default of payment to the use of A. for life; it was said, that as this was limited to the conuzor, it was a *condition*; but if it had been limited to a stranger, it would have been a good *springing use* upon the non-performance of the *condition* ^p. To prove this the case of *Bracebridge* was cited ^q, which so far as relates to the present point was, that A. seised of the reversion of some lands granted them to B. and C. and their heirs, to their own use, *upon condition* to pay a certain sum on

^a W. Jones, 58. Sed. vide Shep. T. 121, contra. But the authorities there cited do not support his position.

^o See 2 Leon. 16.

^p Smith v. Warren, Cro. Eliz. 688.

^q Plowd. 421. Moor 99. pl. 243. S. C.

a particular day; and in default thereof to stand seised to certain uses. Default was made in payment, and it was held, that by virtue of the statute 27 Hen. 8. c. 10. the use was divested out of the grantees.

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It is a general rule, that where an estate tail is limited, and a secondary or shifting use is limited thereon, the tenant in tail may by recovery bar the limitations over^a. Therefore, it is said, "If tenant in tail be
" with a limitation so long as such a tree
" shall stand, a common recovery will bar
" that limitation^b."

Tenant in tail may bar shifting uses.

When an estate in fee is granted or devised, with a shifting use or secondary fee limited thereupon, this secondary or shifting use in fee must be expressly limited, so as to take effect within the compass of a life or lives in being, and 21 years after; otherwise it will come within the rea-

Within what period shifting uses must take effect.

^a Page v. Hayward, 2 Salk. 570. vide 1 Lev. 35. 1 Sid. 102. See Fearn 15, 16.

^b In the case of Benson v. Hodson, 1 Mod. 111.

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sons of a perpetuity. This limitation of time is not, as Mr. Hargrave^e properly observes, arbitrarily prescribed; therefore, in the case of a posthumous child, it may be extended to a few months longer. But here we must make a distinction, where the whole fee is first limited with a shifting use, or secondary fee thereon; and where the limitation of the use, in the first instance, is in tail. In the former case, we have seen, that the shifting or secondary use must be expressly confined to the period of a life or lives in being, and 21 years, and perhaps a few months over: because, as these kind of shifting uses are not barrable by recovery, they would tend to a perpetuity. Thus, if an estate be limited to A. and his heirs, and if B. (a person then *in esse*) die without leaving any issue *living* at his decease, or if having such issue, all of them should die under the age of 21 years, then to the use of C. and his heirs; this limitation is good, because it is not limited after a total failure of issue of B. But if an estate be limited to A. for life, remainder to trustees to preserve

* Har. Co. Litt. 20. a. note 5.

contingent

contingent remainders, remainder to the first and other sons of A. in tail, remainder over; with a proviso, that if B. die, and there should be a total failure of heirs, or heirs of the body of B. then the uses limited to A. and his sons should cease, and the lands remain to the use of C. and his heirs: this limitation to C. is valid; because when the first tenant in tail comes into possession, he may bar it by a common recovery, and therefore there is no danger of a perpetuity^d.

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(8.) I have hitherto only noticed such shifting or springing uses as take effect, or arise, upon an event provided for by the deed, in which the original limitations, intended to be defeated thereby, are created. But there is a species of shifting or future use, which arises from the act of some agent or person nominated in the deed; and this is called a use, arising from the execution of a *power*. Every power of this kind is a power of revocation, and new appoint-

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secondary uses
arising upon the
execution of
powers.

^d See *Nicolls v. Sheffield*, 2 Bro. 215. *Doe v. Heneage*, 4 Term Rep. 13. ante 129.

ment;

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ment; for the new uses and estates created under the appointment, must necessarily (as to the extent of such appointment) revoke, defeat, or abridge the uses, which existed, and were executed, previously to the new limitation*. Sometimes an express power of revocation is limited prior to the power of appointing new uses. But this is never necessary.

Powers of appointment are adopted under various circumstances, and they may either by the express provision of the deed precede, or be reserved after, the limitation of uses intended to be executed subject to such powers. Thus an estate may be limited to J. S. and his heirs, to such uses as A. shall appoint, and in default of appointment, and subject thereto, to the use of A. and his heirs. But it is perfectly immaterial^f, whether the power actually precedes, or comes after, the limitation of the use to A. and his heirs. Thus, if an estate be limited to J. S. and his heirs, to the use of A. for life, with

* See 2 Vern. 511.
Moor, 611.

^f See 4 Term. Rep.
181.

remainder

remainder to the use of his heirs, *or* to such uses as he shall appoint; here A. may appoint the use; which appointment will precede and defeat the limitation to, or use executed in, his heirs^a. Indeed in a case^b where an estate was limited to the use of H. R. and his heirs, *and* to such uses as he should appoint by will, Lord Hardwicke thought, that the word *and* must be understood disjunctively for the word *or*, in order to comply with the intention of the parties. But here notice, that if a feoffment, or lease and release, be made to J. S. and his heirs, to the use of J. S. and his heirs, with a power of revocation reserved thereupon, such power is void; because J. S. is in by the common law^c.

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In

^a It is so said in MSS. opinion, signed P. King, July 12th, 1714.

^b Dobbins v. Bowman, 3 Atk. 408.

^c Co. Litt. 237. a. Shep. Touch. 525. I have sometimes seen conveyances made to purchasers to prevent dower in this manner; the estate

is limited to the purchaser and his heirs, to such uses as he shall appoint by deed or will, and in default of and subject to such appointment, to the use of the purchaser and his heirs. Now it may be properly questioned, whether such a power of appointment can be exercised;

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In most modern marriage settlements of consequence, you will find a power of selling and exchanging limited to the releasees, and powers of leasing and jointuring reserved to the tenants for lives. All these powers, by whatever words they are created, take effect by way of limitation of use out of the original feisin of the feoffees, or releasees.

Powers of leasing were very frequent soon after the statute of uses. In a case 42 Eliz^k. a power of leasing is mentioned as a common thing; and it is there said, that the words usual in such powers were, *to make leases or demise for 21 years, or three lives*; which words should be understood to limit the use; and that if a lease should be made in the words of a *demise*, it should enure as a limitation of the use for the term. It is observable, that the most early precedents of

cised; for subject to the power the purchaser is in by the *common law*; and it does not appear to me, that the reservation of the power *before* the limitation to the

purchaser, can make any difference between this case, and that cited above.

^k Moor, 611. See Leaper v. Wroth, cited 6 Co. 33. a. Cro. Eliz. 5. 1 Leon. 35.

leasing

leasing powers, enable the party to *lease* or *demise*¹; whereas the lease being nothing more than a limitation of the use, the words authorizing it should be, *limit and appoint* by way of lease or demise; and yet the old form of leasing powers is in this respect still preserved in the most approved modern precedents^m. I find, however, among Bridgeman's precedents, several powers of this kind, in which the words *limit and appoint* are expressly usedⁿ.

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Lord Coke tells us^o, that powers of revocation in *voluntary* settlements were very frequent in his time. Thus if a man seised in fee, for the advancement of his blood, covenanted to stand seised to the use of himself for life, with remainder over, he would annex a power of revoking those uses. These powers, however, when reserved to the grantors or owners of estates, were, like the voluntary conveyances, in which they were reserved, fraudulent, as against

¹ See West's Symb. f. 275. 1 Leon. 35.

^m See App. 2

ⁿ See 2 Bridg. Conv.

12. 17. 98. &c. So also as to powers of jointuring, ibid. 14. 17, &c.

^o Co. Litt. 237. a.

purchasers,

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purchasers, by the 27 Eliz. c. 4^p. General powers, therefore, of this kind, have been long since disused in settlements, because even when restrained by the consent of trustees, it has been doubted, whether they do not come within the provision of that statute^q. A power was then introduced into settlements, whereby the prior uses were revoked, in case the grantor should *first* settle other lands of equal value to the same uses. This power, as Mr. Booth observes^r, was found inconvenient, because few people are in circumstances to buy new estates, till they have sold their old ones. The modern power of selling and exchanging, which is reserved to the releasees, answers every purpose^s.

Powers of the nature before described are either, first, simply *collateral* to the land; or secondly, relating to the land.

^p See Shep. Touch. 82. b.

64.

^q See 2 Bac. Ab. 607.
and Buller v. Waterhouse,
T. Jones, 94. 3 Co.

^r See opinion at the
end of Hill, Shep. Touch.

^s See App. 3.

First,

First. Powers collateral are such, as are reserved to persons, who have no present interest in the land, and by the revocation of the former uses are to have nothing¹. Such are the powers just mentioned of selling, and exchanging, when reserved to the releasees. A collateral power cannot be released nor extinguished either by the person, to whom such power is reserved, or by the person claiming the estate, subject to it. Therefore, if a feoffment be made in fee by A. to divers uses, with a proviso, that if B. (a stranger) shall revoke, the uses shall cease; B. cannot release this power; and a fine levied, or feoffment made by him, will not extinguish it²; because, as the person to be benefitted under the revocation does not claim the estate from or under B., but is in under the original settler, so he is not barred by his act. So in the case of *Willis v. Shorral*³, Lord Hardwicke held, that a power, vested in a stranger to limit a term of years for raising a sum of money upon a certain event, could not be

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¹ Co. Litt. 237. a. Hard. 415.

² Cited in Digge's case, 1 Co. 174. a. See Al-

bany's cases, *ibid.* 111. a.

³ P. W. 17c. Moor. 605.

⁴ 1 Atk. 474.

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Secondly. Powers relating to the land are either *appendant*, or *in gross*.

Powers *appendant*, are such, as upon their execution are to take effect during the continuance of the estate of the person, to whom such power is reserved. Of this kind are powers reserved to tenants for lives to make leases^x. With respect to these powers, any conveyance by the tenant for life, which wholly transfers his legal and beneficial interest, will entirely destroy them^y. But if a tenant for life convey away his legal estate for life merely for the purpose of letting in a particular charge, this, it seems, will not destroy a power of leasing previously reserved to him^z.

If an estate be limited to the use of A. for life, with many remainders over to other persons, and with a power of revocation and new appointment reserved to A. as to the

^x Hard. 415.

^y Ibid.

^z Ren, lessee of Hall v.

Bulkeley, Dougl. Rep.
292. 2nd edition.

whole fee, this power may be called *appendant*, because it comes within the compass of A.'s estate for life. Therefore if A. by lease and release, or bargain and sale, convey life his estate absolutely to B., this suspends the power as to the remainder of the fee^a. But if he make a lease for years^b, though that lease be tantamount in duration to a conveyance of the whole freehold^c, such lease, it seems, cannot suspend nor destroy the power.

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So the usual power of appointment, limited to a purchaser to prevent the dower of his wife from attaching upon the estate, must be considered as a power *appendant*. And therefore, if the purchaser afterwards convey away the fee by lease and release, fine, or any other conveyance, without having had recourse to the power, the power is thereby extinguished.

A power *in gross* is reserved to a person, who has an estate in the land, but

^a See 2 Roll. Ab. 263. 263.
pl. 2.

^c Goodright v. Cator,

^b Snape v. Turton, W. Dougl. 477. 2nd edition.
Jones, 392. 2 Roll. Ab.

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the estate, to be created under the power, is not to commence until the determination of the estate of such person. Thus, if there be tenant for life, with a power to make a jointure on an aftertaken wife, or to make a lease for years, to commence after his death, to raise portions for daughters; these are powers in gross^d. These powers, says Lord Hale^e, “may by apt words be destroyed “by *release*, or by a fine or feoffment^f, “which carry away and include all things “relating to the land: but an assignment of “*totum statum suum*, or other alteration of “the estate for life, does not affect such “a power.” Therefore, if a tenant for life convey by lease and release, or bargain and sale *in fee*, he does not destroy a power in *gross*, reserved to him: for it is the nature of these conveyances to pass only, what the tenant might lawfully convey. But if a tenant for life, having a power in gross reserved to him, exercises that power by *will*, and afterwards the remainder of the estate

^d See *Edwards v. Slater*, Hard. 410. 416.

^e *Ibid.*

^f So by *recovery*. *Savile v. Blacket*, 1 P. W. 777. Note, the power in that

case is erroneously called *collateral*; whereas, according to Lord Hale's distinction, it was certainly in *gross*.

in fee becomes vested in him, the power is merged and extinguished by the accession of the fee^a.

SECT. V.

Of limitations of uses and creation of legal estates by the statute, which differ from the rules of the common law.

Having explained the nature of powers in general, and the manner in which they may be destroyed or suspended, I shall defer the further consideration of them to a subsequent part of this work, when I shall examine the deed or instrument, by which powers are executed.

From what has been already said^b, it is now, perhaps, scarce necessary to mention, that all future and shifting uses should be limited to arise out of the estate of the *feoffees*, *releasees*, &c. and not out of the estate of *cestuique use*: for if a future use be limited out of the estate of the latter, it would in fact be the limitation of a use upon a use; which the law will not permitⁱ. It follows, that no springing use can be limited upon a bargain and sale: for the use cannot arise out of the estate of the *bargainee*, he being merely a *cestuique use*; nor can it arise

Of the *feisin*, whereout a shifting or future use must arise.

^a Cross v. Hudson, 3 Bro. 30.

ⁱ 1 Co. 136. b. 137. a. Co. Litt. 271. b.

^b Ante f. 11. (5.)

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out of the original feifin of the *bargainor*; for after the bargain and sale, there can be no possibility of feifin remaining in him. But this I shall explain more fully hereafter. As to powers of leasing, they can neither be reserved upon a bargain and sale^k, nor upon a covenant to stand seised^l: for the consideration in the latter conveyance can only extend to the covenantor, and those of his blood, and not to a lessee. But general powers of revocation may be reserved upon a covenant to stand seised^m.

SECT. VI.

Of the effect of
the statute of
uses upon the
laws of *remitter*.

VI. I have now explained how, and in what cases, the creation and limitation of estates by way of *use since* the statute correspond with, and differ from, the antient manner of limiting and creating estates at common law. I shall now proceed to point out the alterations produced by the statute of uses in the antient laws relative to *remitter*.

It is not my intention here to enter into a discussion of the laws of *remitter*, as they

^k Poph. 81.

^m See Shep. Touch.

^l *Mildway v. Standish*,
Moore, 144. 524.

stood at the common law. I shall only premise, that by the common law, if tenant *in tail* had enfeoffed his son in fee, which son at the time of the feoffment was within age, and the tenant in tail had died; the son, after the father's death, as heir *in tail*, would have been remitted to his former estate^a. But since the statute, if tenant in tail make a feoffment in fee to the *use* of his issue being within age, and to his heirs, and then die; and the right of the estate tail descend to the issue, being within age; the issue shall not be remitted; for the issue has the *use* in fee by the feoffment, and then the statute executes it in such manner, and plight, as it was first limited. But in this case, if the issue waive the possession, and bring a *formedon* in the *descender*, and recover against the feoffees, he shall be remitted^b.

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It was a rule, therefore, that if an *infant*, or a *woman*, having right to lands *discontinued*, whereon *entry* was not lawful, came to such lands by way of *use* raised out of the estate, the first taker should not be remitted^c. So in

^a Litt. sec. 660.

^c Hob. 255.

^b Co. Litt. 348. b.

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Amy Townsend's case^d, where tenant in tail made a feoffment in fee to the use of [his wife for life; remainder to his son and heir apparent in fee. The feoffor and his wife died; and it was determined, that the heir in tail was not remitted. However, though the *first taker* be not, as in the case of the issue put by Lord Coke, yet it seems, that the issue of that issue, or the one in remainder after the first taker, shall be remitted^e.

Amy Townsend's case was not affected by the statute 32 Hen. 8. That statute directs, that the fine or feoffment of the husband of the wife's land shall not operate as a discontinuance: and therefore, as to the wife and those claiming under her, it has considerably lessened the effect of the statute of uses upon remitters. The case of Duncombe v. Wingfield^f was in substance thus: A. and B. his wife, being seised in fee in right of B., levied a fine with proclamations to the use of themselves, and the heirs of their two bodies begotten, remainder to J. S. for life, remainder to W. in tail, re-

^d Dyer, 54. a. b.
Hob. 255. Plowd. 111.
^e Co. Litt. 348. b.

^f Hob. 254. Vide 8
Co. 71. b. Dyer, 191.
b.

mainder

mainder to B. (the wife) in fee; afterwards A. alone levied another fine with proclamations to the use of himself and wife in special tail as before, remainder to himself in tail, remainder to himself and E. M. in fee. B. died without issue, and then A. died. Upon this state of the case, three material points were settled. The first point was, that where husband and wife are tenants in special tail, and the husband discontinues by fine or feoffment, and takes back an estate in special tail to himself and wife, the wife is *ipso facto* remitted, and of course the husband; though it is true the husband is so far bound by his own act, that he cannot claim it in his own person. That in Amy Townsend's case the right of the wife was not within the saving of the statute of uses, and of course she was not remitted against the express words of that statute: but that the 32 Hen. 8. had changed the reason of that case; so that now, the use being raised to the wife out of the estate created by the fine, she is not in of an estate *discontinued*, but of an estate whereupon she might enter after her husband's death; and that a right of entry was sufficient to support her remitter, without an actual entry. That it was true the

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fine of the husband alone finally and totally barred the issues in tail, and therefore differed from a feoffment at the common law; yet the entail, which is barred as to the issue, remained, notwithstanding the fine, to the wife in right, as to herself, and to all estates and remainders depending upon it, and to all the consequences of benefit to herself, and to others by her, as long as she lived, as amply and beneficially, as if the fine had not been levied.—2d point. As the husband and wife were both remitted to the first estate tail, of consequence J. S. and those in remainder expectant on that tail, were also remitted. But that upon the *death* of the *wife*, the remainders were dislodged, and turned into *rights*, as they were by the fine, and would have been, if the wife had not been remitted.—As to the 3d point, it was held, that after the death of the wife the remitter ceased, and the land returned again into the estate passed by the second fine; which estate continued during the life of the husband, and would continue as long as there was issue, if there had been any; for till then, those in remainder had no title to demand the land: but after the death of the husband and wife *without issue*, the entry of
J. S.

J. S. was lawful. In this case Lord Hobart said, that if after the death of the wife the husband had properly suffered a recovery, he would have barred all the remainders depending upon any of the estates. He also held in another place, in the same argument, that if the wife had survived the husband, and had suffered a recovery, it would have barred the remainder depending upon the first estate tail; but so long as there was issue living between them, the premises would go according to the estate passed by the second fine.

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It is agreed in the books, that if in the above case, the husband had made a *feoffment*, instead of levying a *fine*, it would not have *barred*, but only have *discontinued*, the right of the issue^s. Therefore, as the wife by her entry would have been remitted, so she would have purged the discontinuance, and restored the right of the issue, by restoring the discontinued estate tail. If too a tenant in tail make a feoffment to the *use* of himself *in fee*, or to the use of himself *for life*, remainder to B. for *years*, and does not dispose of the

^s 1 Lev. 49. 1 Sid. 63.

reversion;

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reversion; in either case, the issue, it seems, is remitted, though the tenant in tail himself is not ^h.

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VII. I HAVE before observed, that uses in their commencement were of a secret nature, depending merely upon a parol agreement or declaration between the feoffee and cestuique use. But in process of time it was found necessary to make some certain declaration of the use, indicative of the intention of the parties: and this declaration of the use must now by the statute 29 Car, 2. c. 3. be in writing ^a.

The conveyances by bargain and sale, and covenant to stand seised, are in fact nothing more than declarations of uses; for the use being served out of the seisin of the bargainor and covenantor in those conveyances, they merely serve to declare the use to the bargainee and covenantee. But upon such conveyances as operate by way of transmutation of possession, the use may be

^h 1 Roll. rep. 260.
Moor, 846. pl. 1143.
B. N. C. 215. 8 Co. 72.

^a Lane. 93 to 96.

^a See Holt's Rep. 736.

declared

declared by a deed or writing distinct from the conveyance, by which the possession is transferred. Indeed upon the conveyances by feoffment and lease and release, it is now universally the practice to declare the use in the same deed immediately after the habendum. But in respect to fines and recoveries, the uses are declared either by deed *precedent* or *subsequent* to the levying of the former, or suffering the latter. After the statute 27 H. 8. c. 10. it became a questionable point, whether if a recovery were suffered or fine levied, without any previous declaration of the uses, any subsequent deed could direct them? For it was thought, that upon suffering the recovery or levying the fine, the use resulted to the recoveree or conusor, which resulting use the statute immediately executed: so that the use being once vested and executed by the statute, it could not be divested by any subsequent declaration. However in Downman's case^b it was determined, that though the use resulted to the recoveree or conusor until the subsequent declaration, yet when that was made, the use was immediately executed according

^b 9 Co. 7. b. See Bassett's case, Dyer, 136. a.

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to the declaration. Soon after the statute 29 Car. 2. c. 3., which directs that all creations and declarations of uses shall be in writing, it again became a doubt, whether resulting uses upon fines and recoveries were not so executed as to exclude any *subsequent deed*^c: for it was supposed, that the statute required the use to be declared either previously to, or at the time of, levying or suffering such fines and recoveries. Therefore by the statute 4 Anne, c. 16. s. 15. declarations of the uses of fines and recoveries manifested by any deed, made by the party, *after* the levying of such fines or suffering such recoveries, shall be as effectual, as if the 29 Car. 2. c. 3. had not been made^d. Observe here, that this latter statute only mentions fines and recoveries; therefore the same doubt still remains as to the conveyance by feoffment.

I shall now consider, First, who may declare uses.—Secondly, In what cases one declaration of the use shall be controuled or annulled by a subsequent declaration.—

^c See Gilb. uses, 62.

where the declaration of

^d See *Bushell v. Burland*, Holt's rep. 733,uses was *four* years after the fine had been levied.

Thirdly,

Thirdly, The general construction upon, and effect of, the declaration of uses.

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First. Who may declare or limit the use.

Who may declare uses.

The king may declare uses upon his letters patent, though indeed the patent of itself implies a use^e. But if the king grant lands to J. S. and his heirs by his letters patent, to the use of J. S. *for life*; here J. S. has only an estate for life, and the king has the inheritance without any office found: for implication out of matter of record ever amounts to matter of record. The queen may also declare uses^f.

The king.

The queen.

An idiot or person of non-sane memory may declare uses upon a fine or recovery; which declaration of uses will continue valid as long as the conveyance, upon which the uses are declared, remains of force^g. The same law holds as to an infant. Therefore

Idiota.

Infants.

^e Bac. uses, 66.^f Ibid.^g Mansfield's case, 12 Co. 124. Lewing's case, cited 10 Co. 42. b. But

see 4 Leon. 89. and Sir Butler Wentworth's case, cited 2 Vef. 403. 3 Atk. 313.

if

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if an infant levy a fine, or suffer a recovery, and limit the use thereupon, he cannot avoid the declaration of the use, without avoiding also the fine or recovery^b: for as the matter of record stands, the law supposes, that the conuzor or recoverer was of full age; and the deed to declare the uses, being part of the fine or recovery, shall stand likewise. But a covenant by an infant in consideration of marriage or blood to stand seised to an use, is utterly void¹. So if an infant agree to levy a fine to certain uses, when he comes of age, such agreement will not operate as a declaration of the uses of the fine levied in pursuance thereof^k.

Baron and feme.

It seems, that a feme covert cannot, without the consent of her baron, create or limit the use of her lands¹. But if *baron and feme* levy a fine, or suffer a recovery, of lands, of which they are seised in right of the feme, or whereout the feme is entitled to dower, though they ought regularly to join in the

^b Bac. uses, 67. 2
Co. 58. a. 10 Co. 42.
b. 3 Atk. 710. Moor,
22. pl. 73.

¹ Bac. uses, 67.

^k Nightingale v. Ferrers, 3 P. W. 207.

¹ See And. 164. pl. 209. in case of Colgate v. Blythe.

declaration

declaration of the uses of such fine or recovery, yet if the husband in such case alone declare the uses, his declaration will bind the feme (although an infant^m), if she do not dissent to itⁿ: for as she joined with her husband in the fine or recovery, the presumption is, if the contrary cannot appear, that she agreed with him in the declaration of uses. Indeed if she acquiesce for any length of time after her husband's death in the declaration of uses made by him, she cannot afterwards invalidate the fine or recovery^o. As the conveyances by feoffment and lease and release do not bind the feme, though she be a party, so any declaration by her and her husband of the uses raised upon those conveyances shall be void as to her^p. But if husband and wife bargain and sell lands for money, and afterwards levy a fine to the bargainee, the bargain and sale is considered merely as the declaration of the use of the fine, and as such will bind the wife for ever^q. If in declar-

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^m 2 Roll. ab. 798.

^o Swanton v. Raven,

ⁿ Beckwith's case, 2

3 Atk. 105.

Co. 57. a. Moor, 197.

^p Gilb. uses, 244.

Anon. Moor, 22. pl. 73.

^q 2 Co. 57. a. Moor,

Luther v. Banbong, Dy.

22. pl. 73.

290. a.

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ing the uses of a fine levied or recovery suffered of lands, held in right of the wife, the husband and wife make separate declarations of the uses, neither of them can stand, and then it will be the same as if no declaration were made; in which case the use will result, and return to its former course, viz. to the feme and her heirs^r. But with respect to baron and feme, we must here make a distinction between a limitation of the use of *part* of the estate in the land, and the limitation of the use of part of the land itself. This distinction was taken in Beckwith's case^s. Thus, if husband and wife differ in the limitation of the particular use, but concur in the limitation of the uses in remainder, yet the whole of the uses are void. But if they agree in limiting the use of part of the land itself, and vary in the declaration of the use of the residue, the declaration shall be good for the part they agreed in, and void for the remainder.

Tenant for life,
and remainder-
man.

So if tenant for life and remainder-man levy a fine, or suffer a recovery, and the te-

^r Moor, 197. pl. 347.

^s 2 Co. 56. b. 58. a.

nant for life alone declare the uses, this declaration shall not affect the remainder-man^t. And it should seem, that if the remainder-man seal, and be a party to, the deed, in which the tenant for life alone covenants to suffer a recovery, &c. to certain uses, this does not bind the remainder-man, though he afterwards should join in suffering the recovery, &c.^u. Joint-tenants may each declare different uses of their respective shares^v.

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Joint-tenants.

Secondly. In what cases the first declaration of the use shall be controuled by a subsequent one.

In what cases
the first declara-
tion shall be con-
trouled by the
subsequent.

If there had been a deed *precedent* to lead the uses of a fine or recovery before the statute of frauds, there could have been no averment by parol of any other uses, than what appeared upon such precedent deed^w. But a subsequent deed or writing, declaring uses

^t See *Roe v. Pop- an infant; therefore quare.*
ham, Dougl. 25.

^v 2 Co. 58. a.

^u Per Master of the
Rolls in *Nightingale v.*
Ferrers, 3 P. W. 206.
But note, in that case the
person in remainder was

^w *Countess of Rut-*
land's case, 5 Co. 25. b.
26. a. *Dowman's case*,
9 Co. 10. b.

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different from those limited in the precedent deed, was a sufficient alteration of the first uses. But this second deed should have been executed before the recovery was suffered or fine levied^{*}; for afterwards the recoveree or conuzor could by no means have avoided the prior uses. But herein they made a distinction, viz. if a recovery were suffered or fine levied without any previous declaration of the uses, and then the uses were declared by a subsequent deed, the parties by parol might have varied the uses from those declared in the original declaration^y. But since the statute of frauds, which requires all declarations of trust to be in writing, there cannot be a parol averment, except indeed it be to rebut a resulting use^z. Subject to this statute, the rules relating to declarations of uses are nearly the same, as they were formerly. Therefore if there be a deed leading the uses of a recovery or fine, and a subsequent declaration be also made by deed before the recovery is suffered or fine levied, this last declaration shall hold against the

^{*} Moor, 107. pl. 249.
See post Jones v. Morley.

^y 5 Co. 26. a. 9 Co. 10. b.

^z Dougl. 26.

first, because until the recovery be suffered or fine levied, the use or estate is but *directory*, and the last agreement shall therefore prevail^a. But this rule takes place only, where both of the declarations are merely voluntary, or where the second is made with the consent of all persons parties to, and interested in, the first declaration. Therefore where a tenant in tail conveyed his estate by lease and release in consideration of marriage in strict settlement, and afterwards joined in suffering a recovery to the use of a mortgagee; it was determined, that the recovery should first enure to the uses of the settlement^b. So where A. was tenant for 99 years, if he so long lived, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail, remainder to himself in fee. A. having two sons, B. and C. they joined in a lease and release of the premises to certain uses; and there was a covenant to suffer a recovery within twelve months to

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^a Jones v. Morley, 2 Touch. 519. 6th ed.
Salk. 677. Ld. Raym. ^b Cheney v. Hall,
287. Show. P. C. 140. Amb. 526. Moody v.
Comb. 429, 430. Shep. Moody, *ibid*, 649.

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those uses: afterwards they, with the heir of the surviving trustee, joined in a lease and release to make a tenant to the *præcipe* for the purpose of suffering a recovery to the uses of the first indenture. Before any recovery was suffered, B. the eldest son died, and after his death, and before the said recovery was suffered, A. and C. by another deed covenanted to suffer a recovery to certain other uses; and before the expiration of the twelve months specified in the first deed, a recovery was suffered. Upon an issue directed, it was proved, that B. was illegitimate. The question now was, whether the first deed, declaring the uses of the recovery, and made by A. B. and C. should stand in preference to that made by A. and C. alone? Lord Hardwicke held, that the first deed by A. B. and C. was a good deed to lead the uses of the recovery. That when A. B. and C. and the heir of the surviving trustee made a tenant to the *præcipe*, they passed a defeasible estate to serve the uses of the first deed, and that the recovery, suffered within the twelve months, rendered that defeasible estate indefeasible, though one of the parties died before the recovery was suffered. That the last deed by A. and

and C. was not sufficient to alter the uses declared by the first, because not made by the agreement of all the parties^e.

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When, however, the estate is *executed* pursuant to the uses declared by a deed precedent, then no averment by deed or writing can be admitted of other uses^d, provided the recovery be suffered or fine levied pursuant or conformable to the deed leading the uses. But if the recovery or fine vary in circumstances from the precedent declaration of uses, then other uses may be averred even by writing without seal^e. Here observe, that though the fine does not altogether agree with the precedent deed in circumstance, yet if there be no subsequent declaration, the fine will enure to the uses so declared^f.

^e Stapilton v. Stapilton, 1 Atk. 1. See Durnford v. Lane, 1 Bro. Cha. rep. 106.

^d Shep. Touch. 579. 6th ed. 9 Co. 10. b. 11. a. Comb. 429. 1 Atk. 9. See Cro. Jac. 29.

^e Jones v. Morley, supra, Shep. Touch. 520. 6th ed. Gilb. uses, 260.

^f Shep. Touch. 520. 6th ed. 2 Co. 76. a. Havergill v. Hare, 2 Roll. ab. 799. 1 Atk. 7.

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A further observation occurs: if there be a recovery suffered or fine levied without a precedent deed to lead the uses, and after such suffering of the recovery or levying of the fine, a deed is executed declaring the uses, it seems, that a subsequent deed, or writing without seal, will serve to alter the uses declared by the first deed, whether such first deed does, or does not, vary in circumstances from such recovery or fine^s.

The construction upon, and effect of, the declaration.

Thirdly. The general construction upon, and effect of, the declaration of uses,

No formal words are necessary.

(1) A very slight expression will serve to declare the uses of a fine or recovery. No formal set of words is required for that purpose. Therefore whenever the *intention* of the parties can be collected in the limitation of the uses of a fine or recovery upon any expression in a precedent or subsequent declaration or conveyance, such declaration or expression is

^s 2 Salk. 676. 9 Co. Dy. 307. b. Shep. Touch.
10. b. Vavisor's case, 521. 6th ed.

sufficient

sufficient to declare the uses of the fine or recovery ^h.

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(2) "The declaration of the uses must be certain, and that especially in three things; in the persons to whom, in the lands, &c. of which, and in the estates by which, the uses are declared; and if there want certainty in either of these, the declaration is not good; and it must be complete in itself without any reference to indentures or other writings to be made afterwards, for then it is but an imperfect communication and no complete declaration ⁱ."

Must be certain as to the persons, place, and estate.

(3) It is not necessary, that there should be a consideration expressed in a deed to lead or declare the uses of a fine or recovery ^k.

No consideration necessary.

(4) It has been before observed, that if a man, seised on the part of his mother,

Whether it breaks the descent, when it declares the use to the recoverer, or conuzor in fee.

^h See 3 P. W. 208.

6th ed.

ⁱ Lord Ray. 290. 12 Mod. 162.^k See Har. Co. Litt.

123. a. note 8. 1 Ld.

ⁱ Shep. Touch. 519.

Raym. 290.

had

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had made a feoffment without any consideration or declaration, and the use had thereupon resulted to him in fee, or if he had expressly declared the use to himself and his heirs; in either case the descent would not have been broken, but the lands would have descended to the heirs on the part of the mother¹. So if a tenant in tail, who takes by *descent* from his maternal ancestor, suffer a recovery, and declare the use to himself in fee, the descent is not broken, and the newly acquired fee will descend to the heirs *ex parte maternâ*^m. But here a distinction is taken—if a tenant in tail take by *purchase* under a settlement, made by his ancestor *ex parte maternâ*, and suffer a recovery with a declaration of the use to himself in fee, the estate in fee will descend to his heirs *ex parte paternâ*ⁿ. But it should seem, that in this latter case, if the reversion in fee *ex parte maternâ* be in the tenant in tail, a fine by him would have a very different operation; for it is the nature of a fine to let in the reversion^o.

¹ See ante, 68.

^m Roe dem. Crow v. Baldwere, 5. Term, 104.

ⁿ Martin v. Strachan,

note (a) 5 Term. Rep. 107.

^o See 5 Term. Rep. 108, 109.

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Of uses which
are not executed
by the statute.

VIII. By the words and meaning of the statute, four necessary points are to be observed for the execution of an use^a. 1st. There ought to be a person *seised* to the use. 2dly. There must be a cestuique use *in esse*. 3dly. There must be a use in esse, *scil.* in possession, reversion, or remainder. 4thly. The estate or seisin out of which the use arises ought to be vested in cestuique use; for the words of the statute are, and that the estate of such person seised to the use shall be adjudged in cestuique use, &c. It follows, that if the above four maxims do not concur, there can be no execution of the use. Therefore contingent uses cannot be executed by the statute^b.

The doctrine of contingent uses is fully explained in the two cases of *Dillon v. Friene* (or *Chudleigh's case*) and *Wegg v. Villers*.

1st. Contingent
uses.

Chudleigh's case^c was in effect thus: A. enfeoffed B. C. D. and their heirs to the use of himself and his heirs on the body of Mary (then the wife of Sir T. C.) lawfully begotten, and in default of such issue to the use

^a 1 Co. 126. a.

^c 1 Co. 120. a.

^b Bac. uses, 45.

of

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of his heirs on the body of Elizabeth (then the wife of R. B.) lawfully begotten; and in default of such issue to the use and performance of his will for ten years immediately after his death, and after the said term ended, to the use of the said feoffees and their heirs during the life of C. C. his son, and after his death to the use of the first issue male of the said C. C. lawfully to be begotten, and to the heirs of the body of such first issue male lawfully begotten, and in default of such issue to the use of the second issue male, &c. in like manner; and so on to the tenth issue, with several remainders over, and with the reversion in fee to the said A. Afterwards A. died without issue by either of the women; and the feoffees before the birth of the first son of C. C. enfeoffed the said C. C. to the use of himself in fee, without any consideration, but with notice of the former uses. The first son of C. C. was afterwards born; and the question was, whether the feoffment destroyed the use in remainder so limited to the first son of C. C.? which question depended upon another, viz. whether before the contingency happened, i. e. the birth of the son, the use vested, and was executed in
the

the son? it was determined by the majority of the judges, that the use before the contingency was not executed in the son; and that the feoffment entirely destroyed, and prevented the execution of the uses in contingency, although made without any consideration and with notice.

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By the arguments of the judges in this case, it seems to be the better opinion, that upon the feoffment of A. all the uses *in esse* were immediately executed, and that there was no present actual seisin left in the feoffees, nor were the contingent uses executed: that though there was no *actual* seisin left in the feoffees after the first feoffment, yet a *possibility* of seisin remained in them to serve the contingent uses, when they should arise, or come *in esse*: that this possibility of seisin, if it had not been disturbed, would have enabled the uses, when they came *in esse*, to have been executed by the statute; but as at the time the uses came *in esse* in the principal case, the possibility of seisin was destroyed, that there consequently could be no seisin left to serve such uses.

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In the debate upon the case of *Wegg v. Villers*, reported by Roll and mentioned hereafter, it was agreed, that if a feoffment be made to the use of A. for life, remainder to C. for life, remainder to the first son of C. in tail, with divers contingent uses in remainder, with the remainder to the right heirs of A.; in this case the feoffment of A. will not destroy the contingent uses, because though the remainder to C. was divested, yet he had a right to enter for the forfeiture, which right of entry would support the contingent uses: that if C. had made his entry either in A's lifetime, or after his death, that would have reduced the contingent uses; so that if a son had been born in his lifetime, the use to such son would have been executed by the statute without any entry by the first feoffees; that if C. had died leaving a son, and without having made his entry, the first feoffees might have entered, and thereby restored their seisin (*scintilla juris*) to serve the use to the son of C.

In the former edition of this work, the following case was stated. If there be a feoffment to the use of A. for life, remainder to his first son, &c. remainder

mainder over, if A., before the birth of a son, make a feoffment, this shall divest all the estates, *but still there is a right of entry in the feoffees to restore the former estate*, and upon their entry they have a seisin sufficient to serve the use to such first son. But the case thus put, as to the right of entry in the feoffees, and the operation thereof, does not appear to be correct. For supposing the *scintilla juris* remaining in the feoffees could enable them to enter to re-vest the estates divested (which it will do in particular cases, as in the case previously mentioned from Roll), yet in the case here stated their entry could serve no purpose whatsoever. For there being no son born at the time of the entry, the use to such son could never be executed; according to the rule, that a contingent remainder must take effect (if at all) *eo instante*, that the particular estate determines. If indeed, as in the case from Roll, a *vested* estate had supported the contingent remainder, till it came *in esse*, and then the intervening tenant of the vested estate for life had died, without having made an entry, the entry of the feoffees would have supported the contingent remainder, which came *in esse* during the existence of the intervening estate. But that

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is widely different from the present case. In the case from Roll the *vested* estate supported the contingent remainder during its contingency, and the subsequent entry of the feoffees restored the seisin to serve the use, which *then* was *in esse*. In the present case the general feoffees have no vested estate to preserve the contingent remainders during their contingency; but could by their entry only give such a seisin as would *serve uses in esse at that time*; it was from the want of this vested estate in feoffees (*which it was agreed in Chudleigh's case they had not*), that gave rise to the practice of inserting trustees to preserve contingent remainders. By this mode the trustees have a power to enter for forfeiture, and to continue in possession during *the life* of the tenant for life; and this estate limited to them upon commission of forfeiture has been held to be a *vested* estate, and will preserve the contingent uses as effectually as the intervening estate for life in the case put by Roll, supposing the trustees in the one case, and the intervening tenant in the other, to make an *actual* entry. Indeed Mr. Fearne has endeavoured to prove, that the mere *right* of (without an *actual*) entry will preserve the contingent uses.

In

In the case of Wegg and Villers^d, A. seised in fee, covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder to his daughter B. for life, remainder to the first son of the body of B., remainder to the other sons, remainder to his right heirs. Afterwards A. granted the *reversion* in fee to J. S.; but *without* any consideration, and *reciting* the former uses. A *then* made a *feoffment* in fee of the same lands. B. married, and had issue a son, and A. died; after whose death his wife entered. B. died; and also the wife. The question was, whether the use to the first son of B. unborn was destroyed by this grant and feoffment? And it was determined, that it was *not*; for when A. covenanted to stand seised to the uses above mentioned, all the uses *in esse*, viz. to his wife and daughter, were immediately executed by the statute; that being the case, he actually and in fact stood seised only of the reversion, out of which seisin the contingent use to the first son of B. was to be served. Now, when A. granted the reversion, without any consideration, and with notice of the

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^d 2 Roll. ab. 796.

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former uses, he granted no greater or other estate, than what he was seised of; so that the grantee having notice of the former uses, and coming in as of the same estate, that A. had, he had the proper requisites to stand seised to the former uses, viz. notice, and privity of estate. By this construction the grantee was as fully seised to the uses, as A. himself was. The *grant* therefore of the *reversion* did not destroy the contingent use to the first son of B. But did the subsequent feoffment destroy these uses? No. Consider the state of the case *after* the *grant*. A. was then tenant for life, his wife tenant for life, B. tenant for life, and C. (the grantee) seised of the reversion, out of whose seisin the contingent use to the first son of B. was to arise. A. himself had not the seisin to serve the contingent uses. Therefore when he made the feoffment, though he divested all the estates, and among the rest the estate of the *grantee*, yet he did not destroy the *seisin* of the grantee to serve the contingent uses; or in other words, he did not bar the entry of the grantee for the purpose of revesting the seisin, to serve the uses, when they came *in esse*. Then as the wife and B. were tenants for life, their entry (suppos-

ing

ing they did enter) was sufficient to support and re-vest the estate of the grantee; and when the estate of the grantee was re-vested, the use to the first son of B. could well be served, when it came *in esse*, without any formal entry by such grantee. But supposing neither the wife nor B. had entered, then there would have been a necessity for the grantee to have entered in order to re-vest the contingent use.

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(2.) Uses limited of copyhold lands are not within the statute of uses^e; for if uses were permitted to be limited on conveyances of copyhold estates, then there would be a transmutation of possession by the sole operation of the law; which would be contrary to the nature of copyhold tenure. For it is a principle of that tenure; that the lands cannot be aliened, without the consent of the lord.

Uses limited of
copyhold estates.

(3.) As the statute 27 Hen. 8. c. 10. was made previously to the statute of wills, 32 and 34 Hen. 8., it necessarily follows, that

Devises to uses.

^e Co. copy. sec. 54. Cro. Car. 44. 2 Ves. 257.

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the former does not extend to *devises* to uses; for a statute cannot be considered to extend to any thing, which at the time of the making of it did not exist^f. But as the testator's intention is generally the guide in cases of *devises*, it has been repeatedly determined^g, that if A. devise to B. and his heirs, to the *use* of, or in trust for, C. and his heirs, or in trust to permit C. and his heirs to take the profits, it shews, that the testator intended, that C. should have the *legal* estate in fee; and the law, upon this interpretation of the testator's meaning, will give the devise such an operation. But if there be a devise to the *use* of A. for *life*, remainder over, this cannot take effect by way of *use*, because as there was no *seisin* to serve the use, in that case there can be no use.

Trusts to pay
over, &c.

(4.) Very soon after the statute of uses an opinion was delivered, that though a feoffment in fee to the use of the feoffor for life, and after his decease that J. N. *shall take the profits*, be an use executed in J. N.; yet if it had been, that after his death the

^f Note, 1 Co. Litt. 271. b. under fol. 277. a. ^g 1 Vern. 79. 415. 2 Salk. 679. 2 Atk. 573.

feoffee

feoffee *should receive the profits, and pay them over* to J. N.; this would not be executed by the statute^h, because the legal estate must be in the feoffees in order to enable them to pay over the profits. This construction has ever since prevailed; and therefore it is now clear, that if there be a conveyance in trust to pay over the profitsⁱ, or to convey^k, or to sell^l, &c. the legal estate must in these cases necessarily vest in the trustees. So it is of a trust *to permit* a feme covert to receive the profits for, or to *pay* the same to, her *separate* use^m; and in a late case, where there was a devise to trustees and their heirs in trust to permit a feme covert to receive the rents and profits for her separate use for life, and after her decease *to the use* of the first and other sons of her body, &c. with other limitations over, in default of issue, for the *separate use* of other

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^h 36 Hen. 8. Bro. feoff.
al. uses, 52, B. N. C.
282.

ⁱ Symson v. Turner, 1
Eq. ab. 383. Silvester v.
Wilson, 2 Term. rep.
444.

^k Roberts v. Dixwell,
1 Atk. 607. Bac. uses, 8.

^l See ante, 5. Bagshaw
v. Spencer, 2 Atk. 578.

^m Pybus v. Smith, 3
Bro. 340. Henry v. Pur-
cell, Fearne 75. Nevill v.
Saunders, 1 Vern. 415.
See Bush v. Allen, 5
Mod. 63.

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femes covert, it was determined, that the legal estate *in fee simple* vested in the trustees ⁿ.

Terms of years,
and other chat-
tels.

(5.) As the statute says, that when any person or persons stand *seised* to the use of another, &c., it has been resolved, that a term of years or other chattel interest cannot be limited to a use^o: but we have already discussed the doctrine relating to terms^p.

Use upon a use.

(6.) When the courts of law, after the statute of Hen. 8., took the cognizance of uses, they held, that no use limited upon a use could be executed by the statute; and therefore if there be a conveyance to the use of A. and his heirs, to the use of B. and his heirs, this use cannot be executed in B.^q So if land be limited to A. and his heirs to the intent *or in* trust, that B. and his heirs may receive a rent thereout *to the use* of C. and his heirs, the

ⁿ *Harton v. Harton*, 7 Term. rep. 652. But see *Jones v. Say and Sele* there cited.

^o Bac. uses, 42.

^p Ante, 41 to 49.

^q 36 Hen. 8. B. N. C. 284. *Tyrrel's case*, Dyer, 155. a. *Sambach v. Dalton*, Tothil. 1 Atk. 591.

legal

legal estate in the rent will vest in B. by the fifth clause of the statute ^r; because the seisin, out of which the rent arises, is conveyed to A., and upon the limitation of such rent to B., the statute is satisfied. There has been however an exception, and I believe only one exception, to this rule. A recovery was suffered of lands to *the use* of A. and his heirs, yielding for the same a rent to B.; it was urged, that the rent ought to have been limited out of the estate of the recoverors; and not out of the possession of *cestuique use*; yet it was determined, that the rent was well executed by the statute ^s.

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^r Chaplin v. Chaplin,
3. P. W. 229.

^s Cromwell's case, 2.
Co. 69. b.

C H A P. III.

Of Trusts since the Statute 27 Hen. 8. c. 10.

SECT. I.

Of the introduction and policy of trusts since the statute of uses,

I HAVE in another place attempted to prove, that it was not the intention of the legislature in passing the act of 27 Hen. 8. c. 10. to abolish every species of fiduciary interest. But whatever might have been the view of the legislature, the statute certainly did not execute the *trust* in the instances just mentioned. The construction therefore adopted by the courts of common law upon the statute of uses soon obliged *cestuique trust* to seek redress in the courts of equity, which indeed was readily granted to him; and the consequence has been, that this statute has had no other effect, than the abolition of the ancient use at common law with its numberless inconveniences, and the introduction of a new kind of use, by the name
 8 of

of *trust*, modelled by the court of chancery after its own fashion, and being, as it is properly called, a creature of equity. The chancery was well aware of the mischiefs attendant upon uses before the statute; and therefore in exercising an exclusive controul over these *trusts*, it has formed them so as to answer all the contingencies of family settlements, and domestic provisions. Lord Mansfield, in the case of *Burgefs v. Wheate*^a, expresses his approbation of the system of trusts in this manner; “By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been raised. Trusts are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute Hen. 8. meant to avoid.” Indeed, as most of the property in the kingdom is now conveyed in trust, as the laws and decisions relative to trusts are well understood, and as the convenience resulting from them is generally experienced, any alteration or abolition

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^a 1 Black. rep. 160.

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of their present system by the legislature is an event not to be expected; certainly not to be desired. An expression is sometimes to be found in the books, that *trusts* are now, what *uses* formerly were. But however true it is, that we have borrowed the notion of trusts from the doctrine of uses, yet in their construction trusts differ very widely indeed from uses: or as it has been observed in respect of uses and trusts^b, “there is no difference in the principles, “but there is a wide difference in the exercise of them,”

The trust, occasioned by the statute of uses, is of a *permanent* and *general* nature, or a kind of *secondary use*. But the system introduced by the court of chancery, relative to trusts since the statute, extends not only to trusts declared upon a legal estate *in fee*, but to those declared upon the estates of tenants in *tail*, *for life*, and *years*, and to the *special* trust before noticed.

SECT. II.

Of the definition, and several kinds of trusts.

II. A TRUST, generally speaking, is a right on the part of cestuique trust to receive the

^b 1 Black. rep. 480.

profits,

profits, and to dispose of the lands in equity^c. But there may be special trusts for the accumulation of profits, the sale of estates, or the conversion of one trust fund into another, which may preclude all power of interference on the part of cestuique trust until such special trust be satisfied.

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All *equitable* titles, however, are not included in the generality of the term, *trust*. Thus an equity of redemption is said to be a *title* in equity, and not merely a trust^d; and therefore it has been determined, that an execution cannot be taken upon an equity of redemption^e; though by the statute of frauds, it can upon *trust* estates of inheritance.

III. It has been observed, that the courts of equity, in forming a system respecting the secondary use or modern trust occasioned by the statute of uses, have endeavoured to avoid the mischiefs, and to adopt the conveniences, arising from the ancient use. It

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Of the properties and rules of the trust estate as distinguished from the legal estate.

^c 1 Mod. 17.

^e *Lyster v. Dolland*, 3

^d Hard. 467. 1 Black. Bro. 478. 2 Atk. 292.

rep. 145.

will

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will be now necessary to state the properties of the trust estate, as distinguished from the legal seisin of the trustee, and to enquire into the rules by which trusts are governed.

Limitations, per-
petuities, barring
estates tail.

Descent.

Alienation.

It is, generally, a maxim, that equity follows the law. The rules of limitations^f, perpetuities^g, and barring entails of trusts^h are similar to those of legal estates. Trust estates descend according to the rules of descentⁱ; and not only a trust *in esse*, but the possibility of a trust, may be assigned in equity^k; and it has been determined^l, that a husband may dispose of the trust of a term, to which he is entitled in right of his wife; and it should seem, that in case the husband shall survive his wife before such disposition made by him, he will be entitled to the trust upon the survivorship^m.

^f 2 P. W. 713. 3 P. W. 259. Amb. 473. Mr. Cox's note to Papillon v. Voice, 2 P. W. 478.

^g The Duke of Norfolk's case, 3 Cha. ca. 1. 48.

^h 2 P. W. 713.

ⁱ Ibid.

^k Warmistrey v. Tanfield, 1 Cha. rep. 29. 1 Cha. ca. 8.

^l Tudor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 208. note 1.

^m See Butler's note. Co. Litt. 351. a.

A trust

A trust may also be devised^a, but with the solemnities required by the statute of frauds upon the devise of legal estates^o; and as copyhold estates are not within that statute, trusts declared upon them will pass by an unattested will^p.

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Devise.

Trust estates are assets to satisfy creditors either in the hands of the heir^q or executor^r, according to the tenure of the property made subject to it; and by the statute of frauds they are also made liable to executions upon judgments, statutes, and recognizances.

Assets.

There may also be a tenancy by the curtesy of a trust of inheritance^s; but in a particular case^t, where lands were devised to trustees and their heirs, in trust for the

Curtesy.

^a See Fearne, 539, last edit.

^o Wagstaff v. Wagstaff, 2 Cox's P. W. 258. note 1. Adlington v. Can, 3 Atk. 151.

^p Tuffnel v. Page, 2 Atk. 37. note 2. last edit.

^q King v. Ballett, 2 Vern. 248.

^r 3 P. W. 343. 2 Vern. 764.

^s Watts v. Ball, 1 P. W. 108. Chaplin v. Chaplin, 3 P. W. 234. Castorne v. Scarfe, 1 Atk. 603.

^t Hearle v. Greenbank, 3 Atk. 695. 716.

Separate

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separate use of the testator's daughter during her life, and after her decease for such persons, to whom she should devise the same; Lord Hardwicke decreed, that the husband should not have his curtesy.

Forfeiture for
treason or felony.

The trust of a fee simple or fee tail is forfeited by the attainder of cestuique trust for treason^u; and it is said^w, that cestuique trust of a term forfeits it for felony, and upon an outlawry in a personal action.

Dower.

On the other hand, a trust of inheritance is not subject to dower^x; though we have seen, that it is to curtesy. The reason for which distinction appears to have been, that purchasers, by the advice of conveyancers (who formed their opinion upon trusts from the ancient use at common law), having taken their conveyances in the names of trustees for the purpose of barring dower, it was thought, that a decision in its

^u Hard. 495. 2 Freem. 130. 3 Cha. rep. 34.

^w 3 Cha. rep. 36. Hob. 214. Jenk. Cent. 190. Hard. 490.

^x Colt v. Colt, 1 Ch.

rep. 254. Bottomley v. Fairfax, Prec. cha. 336. Godwin v. Winsmore, 2 Atk. 525. Dixon v. Saville, 1 Bro. 326.

favour

favour would affect the rights of third persons^y. So the trust of an inheritance will not escheat to the lord upon the attainder of cestuique trust for felony, or for want of heirs^z; because upon the attainder or death the trust is absolutely determined, and consequently there is no person against whom the subpœna can be brought^a.

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Escheat.

It is said, that the statute of limitations does not extend to trust estates; but this rule holds only between the trustee, and cestuique trust; it does not apply to the claims of a stranger^b. So it seems that a fine and five years non-claim will, in favour of a purchaser, bar a trust term, though cestuique trust be an *infant*^c; and if a trustee neglect to sue within the time prescribed by the statute of limitations, cestuique trust (though an infant) is bound by the laches^d.

Statute of limitations, and non-claim.

^y Vide 1 Black. rep. 182.

^z *Burgefs v. Wheate*, Ibid. 123. *Sandy's case*, Hard. 488.

^a 1 Black. rep. 176.

^b *Lewellyn v. Mackworth*, Barn. cha. 445. *Townsend v. Townsend*,

1 Bo. 551.

^c *Earl v. Countess of Huntington*, N. G. 3 P. W. 310. See *Clifford v. Ashley*, 1 Cha. ca. 268. *Wakelyn v. Warner*, 2 Cha. ca. 247. post, 233.

^d *Wych v. East India Comp.* 3 P. W. 309.

But

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Of the properties and rules of the trust estates as distinguished from the legal seisin.

But a trust, created for payment of debts, will revive such debts, as have been barred by the statute of limitations^e.

SECT. IV.

Of the declaration of trusts pursuant to statute 29 Car. 2. c. 3. sec. 7.

IV. To prevent the inconveniences, which arose from parol declarations, and secret transfers of uses, the stat. 29 Car. 2. c. 3. f. 7. requires, that all declarations or creations of trusts of lands, tenements, or hereditaments, shall be manifested by some writing, signed by the party, or by a will in writing; and that assignments of trusts shall also be in writing, signed by the party assigning the same, or by his or her last will in writing. The above statute, it is said, does not relate to the declaration or creation of trusts of mere *personalty*^a.

In respect to the form of the declaration.

(1.) As the disposition of trusts is guided by the courts of equity according to the presumptive intention of the parties, there is no regular or fixed form prescribed by them for the declaration, provided it be in writing, pursuant to the above statute.

^a Lacon v. Briggs, 3 Atk. 107. 3d ed. note 3.
^a Nab v. Nab. 10.

Mod. 405. See Fordyce v. Willis. 3 Bro. 587.

Therefore

Therefore a note, or memorandum in writing, from a trustee, promising to execute a declaration of trusts^b, or confessing that he purchased lands with another man's money^c; a bond from a trustee, either to perform the trusts of a conveyance, in which no trusts are mentioned^d, or to make an assignment, as his cestuique trust shall direct^e; a recital in a purchase deed, that the consideration money belonged to a third person^f; an answer in Chancery, confessing a trust^g; a letter from a trustee, disclosing the purposes of a devise to him^h; these, and in fine, any writing in the shape of mutual covenants, or articles of agreementⁱ relative to the transfer or produce of land, though without seal or stamp^k, if they properly notify or dis-

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Of the declaration of trusts pursuant to statute 29 Car. 2. c. 3. sec. 7.

^b Bellamy v. Burrow, ca. T. T. 97.

^c Lane v. Dighton, Amb. 409. See Ambrose v. Ambrose. 1 P. W. 322. Ryall v. Ryall, 1 Atk. 59, 60.

^d Goodwin v. Cutler, Finch, 356.

^e Moorecroft v. Dowding, 2 P. W. 314.

^f Kirk v. Webb, Prec.

Cha. 84. Deg v. Deg, 2 P. W. 415. Ryall v. Ryall, 1 Atk. 59.

^g Hampton v. Spencer, 2 Vern. 288. Cottington v. Fletcher, 2 Atk. 155.

^h Crooke v. Brockeing, 2 Vern. 106.

ⁱ Legard v. Hodges, 3 Bro. 531.

^k Hoddsden v. Lloyd, 2 Bro. 534.

SECT. IV.

Of the declaration of trusts pursuant to statute 29 Car. 2. c. 3. sec. 7.

In respect to the words of the declaration.

cover the intention of the parties, are sufficient, in a court of equity, to create trusts.

(2.) As there is no regular *form* for a declaration, so there is no particular set of words, nor mode of expression, prescribed by the statute, or adopted by the courts of equity, for the purpose of raising trusts. It has therefore been repeatedly decided, that any words in a will intimating, or in the nature of, a *request, wish, desire, recommendation*, &c., are sufficient to create a *trust*, if the object of the gift, and the gift itself, can be correctly ascertained¹. But if the *certainty* of the gift and object fail, then the trust must also fail, though the intention to create it should appear evident upon the face of the will^m.

V. By

¹ Eales v. England, Prec. Cha. 200. 2 Vern. 466. S. C. 1 Eq. Ab. 297. pl. 3. S. C. Clowdsley v. Pelham, 1 Vern. 411. Jones v. Nabbs, 1 Eq. Ab. 404. pl. 3. Richardson v. Chapman, 1 Burn. Eccl. Law, 225. Vernon v. Vernon, Amb. 3. 2 Bro. Cha. rep. 227. S. C. cited Clifton v. Lombe, Amb.

519. Massey v. Sherman, Amb. 520. Nowlan v. Nelligan, 1 Bro. Cha. rep. 489. Pierfon v. Garnett, 2 Bro. Cha. rep. 38. 226. Finch Prec. Cha. 200. in note, S. C. Lewis v. King, 2 Bro. Cha. rep. 600.

^m Harding v. Glyn, 1 Atk. rep. 469. Le Maître v. Banister, 2 Bro. Cha.

V. BY the 8th sec. of the statute of frauds, where any conveyance shall be made of lands, by which a trust shall arise or result by implication or construction of law, or be transferred or extinguished by operation of law; such trust shall be of like force, as if the statute had not been made. In the case of *Lamplugh v. Lamplugh*^a, it was said, that this clause must relate to *trusts* and *equitable* interests, and not to an *use*, which is a *legal* estate: and it is also observable, that parol proof is admitted to rebut a resulting trust^b.

SECT. V.

Of resulting trusts.

The following, are instances of trusts, arising by mere operation or construction of law.

Cha. rep. 40. cited, Finch
Prec. Cha. 201. S. C.
Bland v. Bland, 2 Bro.
Cha. rep. 43. cited, Finch
Prec. Cha. 201. S. C.
Harland v. Trigg, 1 Bro.
Cha. rep. 142. *Wynne*
v. Hawkins, 1 Bro. Cha.
rep. 180. *Sprange v. Ber-*
nard, 2 Bro. Cha. rep.
585. Note, the case of
Cunliffe v. Cunliffe, Amb.
686, Finch Prec. Cha.

201. S. C. 2 Bro. Cha.
rep. 42. S. C. was over-
ruled by the Master of the
Rolls in the case of *Garnet*
v. Pierfon, 2 Bro. Cha.
rep. cited supra. See 2
Bro. Cha. rep. 46. *Hill*
v. Bishop of London, 1
Atk. rep. 620.

^a 1 P. W. 112.

^b 2 Vern. 294. 1 P. W.
112.

SECT. V.

Of resulting trusts.

Where an estate is purchased in the name of one, and the consideration-money paid by another person.

(1.) If an estate be purchased in the name of one person, and the consideration-money belong to, or be paid by, another, the estate so purchased, will be subject to a trust in favour of the person claiming or paying the money; though there be no express declaration for that purpose^c.

In order to raise a trust of this kind, the fact of the ownership of the money should appear upon the face of the deed, either by a recital, or by expressions, which amount to a necessary implication, or presumptive proof of it^d. If, however, it be expressly stated in the conveyance, that the money was paid by the *nominal* purchaser, and nothing shall appear to explain the nature of the transaction, then, if in his lifetime, such nominal purchaser shall by any note or memorandum in writing^e, or by his answer to a bill filed against him, for a discovery thereof (though he shall at the same time

^c Lloyd v. Spillet, 2 Atk. 150. 257. 1 Atk. 60. 1 Vern. 366. 4 Bro. P. C. 67.

^d See 2 Vern. 168. Prec. Cha. 104. Kirk v.

Webb, *ibid* 84.

^e See ante, 209. and O'Hara v. O'Neil, 2 Eq. Ab. 745. and Vin. Tit. Trust. (E.)

plead

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plead the statute of frauds ^f) confess the purpose, for which the purchase was made; or if after his death, he shall leave any papers, disclosing the real circumstances of the case ^g; in all these instances, the court will raise the trust, even against the express declaration of the purchase deed. If, indeed, upon a bill filed against him for a discovery, the nominal purchaser deny the facts by his answer, and insist upon the statute of frauds, it does not appear to me to be a perfectly settled point, that *parol* proof can be admitted to prove the trust ^h. But I conceive it to be clear, that, *after the death* of the supposed nominal purchaser, *parol* proof *alone* can in no instance be admitted against the express declaration of the deed ⁱ. The cases of Ryall v. Ryall ^k, and Lane v. Dighton ^l, are by no means

^f Cottington v. Fletcher
2 Atk. 155.

^g Ryall v. Ryall, Amb.
413. Lane v. Dighton,
ibid, 409.

^h See Gascoigne v.
Thwing, 1 Vern. 366.
Newton v. Preston, Prec.
Cha. 103. Willis v. Willis,
2 Atk. 71. Riddle v.

Emerson, 1 Vern. 108.

ⁱ Kirk v. Webb, Prec.
Cha. 84. Heron v. He-
ron, ibid 163. Halcot v.
Markant, ibid. 168. Kin-
der v. Miller, ibid. 172.
2 Vern. 440. S. C. Deg
v. Deg, 2 P. W. 414.

^k 1 Atk. 59.

^l Amb. 409.

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authorities against this construction; for as to the former, you will find, by examining Mr. Ambler's report of it^m, that the enquiry was directed only as to 250l. which appeared by *papers* of the testator to have been *trust money*; and as to the latter, there was evidence in the case, under Mr. Dighton's *hand-writing*, that the *trust stocks* had been sold, and the money laid out from time to time in the purchase of land.

The above rule is not applicable to the case of a purchase made by a father in the name of a son, unprovided for at the time of such purchase: for in that case the purchase shall be considered as an *advancement* for the son, and not as a *trust* for the father; though the father takes the possession, and receives the rents and profitsⁿ. The same construction holds, when the grandfather purchases lands, or takes bonds in the name of a grandchild, the father being dead: for then the grandfather is in *loco parentis*^o.

^m Amb. 413. S. C. cited.

ⁿ Gray v. Gray, 1 Eq. Ab. 381. Taylor v. Tay-

lor, 1 Atk. 386. 1 P. W. 111. 608. 2 Atk. 480.

^o Ebrand v. Dancer, 1 Eq. Ab. 382.

In these cases *parol* proof cannot be admitted after the death of the son, to prove, that a trust was intended^p; nor can the father, by a subsequent deed, declare his son to be a trustee^q; nor can the son himself on his sick bed, make a declaration of trust in favour of his father, so as to prevent his own wife from dower^r.

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So if a father buy in the names of his son and a trustee^s, or in the names of himself and son^t, in either case it is an advancement. But in these instances, the father shall have the benefit of survivorship, in case the son die during his minority. But the son shall not have the benefit of survivorship as against the judgment creditor of the father^u.

It seems, that when the son is provided for at the time of the purchase, he stands merely in the situation of a stranger^x. So where a grandmother, during the life of the

^p Shales v. Shales, 1 Eq. Ab. 382.

^q 2 Cha. ca. 231.

^r Bateman v. Bateman, 2 Vern. 436.

^s Lamplugh v. Lamplugh, 1 P. W. 111.

^t Scroope v. Scroope, 1 Cha. ca. 27. Back v. Andrews, 2 Vern. 120.

^u Stileman v. Ashdown, 2 Atk. 477.

^x Elliot v. Elliot, 2 Cha. ca. 232.

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father, invested 100l. in the purchase of exchequer annuities in the name of a grandchild; the child's father gave a bond to the grandmother for repayment of the 100l. if the child died before the grandmother; the grandmother received the income, and kept the tallies, the grandchild making no claim; it was held to be a trust for the grandmother^y.

Where there is a declaration of trust only *as to part* of the estate conveyed or devised.

(2.) When a voluntary conveyance is made of an estate, with a declaration of trust only *as to part* of it; there is a resulting trust in that case for the grantor or his representatives, as to the part of which there is no declaration^z. This rule is equally applicable to trusts created by devise.

It has been before stated, that if there be no consideration expressed in a conveyance at common law, and no declaration of the use, the use will result to the grantor. But it is here necessary to observe, that the mere want of a valuable, or *bonâ fide* consideration, will not *alone* create a resulting trust in favour of the grantor or his representatives.

^y Lloyd v. Read, 1 P. W. 607.

^z Barn. 388. 2 Atk. 150. 156.

Lord

Lord Hardwicke, in the case of *Lloyd v. Spillet*, expressly made his decision upon this distinction between a *use* and a *trust* arising by operation of law^a. In fact, if the mere want of a consideration would create a resulting trust, there could be no such thing as a *voluntary conveyance*, so as to vest a *beneficial* interest in the grantee. Circumstances of fraud, mistake, and the like^b, will convert a grantee, under a voluntary conveyance, into a trustee: but not the mere want of a valuable consideration.

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(3.) Where a trustee or guardian renews a lease, the renewed lease shall be subject to the trust affecting the old lease^c. So, if a lease be settled upon A. for life, with remainders over, and A. obtain a renewal of such lease, the renewed lease shall be bound by the trust of the will or settlement^d.

Where a trustee or guardian renews a lease.

^a Barn. Cha. 387, 388.
1 Atk. 150.

^b See 1 Freem. 305.
308. 2 Atk. 150. and
duke of Norfolk v. Brown,
Prec. Cha. 80.

^c Holt v. Holt, 1 Cha.
ca. 191. Pierfon v. Shore,
1 Atk. 480. Abney v.

Miller, 2 Atk. 597. Ed-
wards v. Lewis, 3 Atk.
538.

^d Taster v. Marriot,
Amb. 668. Raw v. Chi-
chester, *ibid.* 715. Owen
v. Williams, *ibid.* 734.
Pickering v. Vowles, 1
Bro. 197.

In

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In like manner, if one of three lessees, under a lease from a dean and chapter, surrender the old lease, and take a new one to himself only; it shall be a trust for all of them^e. But if there be a guardian or trustee for an infant, to whom lands are descended or devised, but the title is *re verâ* in a third person, and the trustee or guardian buy in the title of the third person; this shall not be taken to be a trust for the infant; for such trustee or guardian is at liberty to purchase it as well as any other person^f.

Where a trust is created for a particular purpose, and no declaration as to the residue.

(4.) When a trust is created by deed or will for a particular purpose, and there is no further declaration, the residue of the trust (subject to the performance of the special intent) will result to the grantor or his representatives^g. Thus, if lands are devised to executors for payment of debts and legacies; after the payment of debts and legacies, the executors will be trustees,

^e Palmer v. Young, 1 Vern. 276.

^f Lesley's case, 2 Freem. 52.

^g Davidson v. Foley, 2 Bro. 203. Cook and

Guavas, cited 2 Vern. 645. and the cases cited in note 1. to Hill v. the Bishop of London, 1 Atk. 619. 3d ed.

as to the surplus, for the heir at law^h; though the executors have no legacy, and the heir at law has an express oneⁱ. So where A. devised lands to trustees to sell, and to dispose of the money as he should appoint, and provided he left no paper of appointment to his four nephews; A. appointed several sums to be paid to several persons, which sums did not amount to the value of the lands; and it was determined, that the surplus resulted to the heir^k. In another case, A. devised to his wife a rent-charge for thirteen years for payment of debts; and devised lands to his wife in augmentation of her jointure. It was decided, that the surplus of the rent-charge, after the debts were paid, resulted to the heir^l.

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So where a rent-charge was devised to be sold to pay legacies to the amount of 800l.; but if the rent-charge sold for 1000l. then an additional legacy of 100l. was given to B. and another of 100l. was given to C.: it was held, in this case, that

^h Countess of Bristol
v. Hungerford, 2 Vern.
645.

ⁱ Starkey v. Brookes,

¹ P. W. 390.

^k City of London v.
Garway, 2 Vern. 571.

^l 1 Bro. P. C. 372.

if

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if the rent-charge sold for above 800*l.* and less than 1000*l.*, the residue, above 800*l.*, would result to the heir at law^m. Upon the same principle, the case of *Digby v. Legard* was determinedⁿ, E. B. devised her real and personal estates to trustees, in trust to sell and pay debts, and to pay the residue to five persons, to be equally divided between them, share and share alike (which words in a will, create a tenancy in common^o); one of the residuary legatees died in the lifetime of the testatrix; and the court resolved, that this was a resulting trust (as to the share in the real estate of the residuary legatee, who died in the testatrix's lifetime) for the benefit of the heir at law,

The general rule, which I have just mentioned, that when lands are devised for a particular purpose, viz. to be sold for payment of debts, &c. there is a resulting trust for the heir at law, admits, however, of several exceptions^p. In

^m *Stonehouse v. Evelyn*, 3 P. 251.

ⁿ Note 1. to 3 Cox's, P. W. 22.

^o 1 P. W. 700. 2 P. W. 282.

^p See note 2. to 1 Atk. 619. 3d ed.

Hill v. Bishop of London^a, Lord Hardwicke observed, that if J. S. devised lands to A. to sell them to B. for the particular advantage of B.; that advantage was the only purpose to be served according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it would; and that there was no precedent of a resulting trust in such a case: and that if A. devised lands to J. S. to lease for three years, at such a fine, there could be no resulting trust to the heir of the testator. In a case^b where there was a devise, by a codicil, to trustees to sell, and to dispose of the money arising by the sale to such uses and for such purposes as the testator should appoint, and in default of appointment, as they (the trustees) or the major part of them, should think proper; the testator having previously devised these lands to the same trustees, for such *charitable* uses as he should direct by codicil or otherwise: the testator made no appointment: the trustees insisted upon the beneficial interest in the lands devised; and the heir at law claimed a resulting trust; but it was

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^a S. C. 1 Atk. 618.

^b Cook v. Duckenfield, 2 Atk. 562.

determined,

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determined, that there could be no resulting trust for the heir; nor could the trustees have any beneficial interest; for that it clearly appeared, that the testator intended them no benefit, but only an authority.

SECT. VI.
Of trusts, as more
immediately re-
ferring to the
person and acts
of cestuique trust.

VI. I SHALL now explain the system of trusts, as more immediately referring to the person and acts of cestuique trust.

Who may be
cestuique trust.

1. Any person, who is capable of taking the legal estate directly and immediately to himself, is capable of the same estate by way of trust^a.

Of actions by
cestuique trust.

2. Cestuique trust may bring his bill in Chancery against his trustee for breach of trust, or to account^b; but he has no remedy against him at law^c. Neither can cestuique trust recover upon his equitable title in the courts of common law as against a third

^a See ante, 96. Note, the king may be cestuique trust, *Middleton v. Spicer*, 1 Bro. 201. But an alien cannot, 3 Cha. rep. 35.

^b See *Digby v. Corn-*

wallis, 3 Cha. rep. 72. *Pollard v. Downes*, 2 Cha. ca. 121.

^c *Sturt v. Mellish*, 2 Atk. 612. Contra, 1 Eq. Ab. 384. (D.) Note (a).

person^d. But, it seems, that a tender to cestuique trust of money due upon bond, and a refusal, is a good plea to an action of debt brought upon the bond by his trustee^e.

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Of trusts, as more immediately referring to the person and acts of cestuique trust.

3. By the statute 7 Will. c. 25. s. 7. it is enacted, that no person shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any *trust* estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits of the same estate; but that the mortgagor, or *cestuique trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust.

Cestuique trust in possession may vote in elections.

4. In the case of Packer and Wyndham^f, it is said, that every disposition of cestuique trust is binding upon the trustee in a court of equity, and even *at law*. But however the disposition of cestuique trust may be binding upon the trustee in *equity* (as it certainly is), yet a *trust*, as we have already seen,

Of conveyances, by cestuique trust.

^d Doe v. Staples, 2 Term. rep. 684. Barnes v. Crow, 4 Bro. 2.

Lutw. 179. Ed. 1718. Semb.

^f Prec. Cha. 415.

^e Lynch v. Clemence,

SECT. VI. is not alienable by the rules of the common law^g.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

It is generally a rule, that any legal conveyance, or assurance, by *cestuique* trust shall have the same effect and operation upon the trust estate in *equity*, as it would have had upon a legal estate at *law*, in case the trustees had executed their trust. Therefore, if a cestuique trust *in tail*, with remainders over of the trust, suffer a common recovery, the entail, and the remainders over, are thereby destroyed in equity^h. But if there be a cestuique trust in tail, and the remainders over are *legal* estates, in this case a recovery by tenant in tail of the trust will not bar the remaindersⁱ. But in another case, a cestuique trust in tail has the advantage of a tenant in tail of a legal estate: for if the trustees join with him, they may bar the

^g Dyer 369. a. 4 Inst. 85.

^h North v. Champernoon, 2 Chā. ca. 63. 78. 1 Vern. 13. S. C. 1 P. W. 91. S. C. Carpenter v. Carpenter, 1 Vern. 440. Beverley v. Beverley, 2 Vern. 131.

Boteler v. Allington, 1 Bro. 72.

ⁱ Robinson v. Cuming, 1 Atk. 473. Salvin v. Thornton, 1 Bro. 73. in note, Ambl. 545. 699. S. C. Shapland v. Smith, 1 Bro. 74.

entail

entail by a *feoffment*^k. Indeed, it has been said, that a common bargain and sale by cestuique trust alone is sufficient to bar the entail^l. But that opinion has been overruled^m. With respect to copyhold lands, where there is no particular custom of the manor to bar the entail of the legal estate, it seems, that a devise by cestuique trust is sufficient to bar the entail of the trustⁿ.

SECT. VI.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

It has been often decided, that a fine, or other alienation by cestuique trust for life, will not work a forfeiture of his trust estate^o; nor will such fine, or other conveyance by him, destroy any contingent remainders dependant upon his life estate^p.

VII. It remains for me to consider the trustee, and the nature of his estate and office.

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Of the trustee, his estate, and office.

^k Bowater v. Elly, 2 Vern. 344.

^l 1 Vern. 440. 2 Vern. 133.

^m 1 P. W. 91. 1 Vef. 260. Legat v. Sewell, 2 Vern. 552. Kirkham v. Smith, Amb. 518.

ⁿ Otway v. Hudson, 2 Vern. 583. See Mr. Cox's note to Dunn v. Green, 3 P. W. 10.

^o Lethieulier v. Tracy, 3 Atk. 728. Whetstone v. Bury, 2 P. W. 146.

^p 1 Vef. 27.

SECT. VII.

Of the trustee,
his estate, and
office.

Who may be
trustees.

I. The modern doctrine of trusts differs perhaps in no instance so essentially from the system of uses, as in the construction of our courts of equity upon the capacity or liability of persons to act as trustees. Formerly we have seen, that the intention of the parties has been frequently frustrated by the rigid adherence of the court of chancery to the technical scruples of the common law; for *uses* were considered as annexed to the *estate* of the feoffees in the land, and not to the *land* itself. Against the notion of an use attaching upon the land, we find the following curious argument:—"It is absurd to say, that confidence and trust can be reposed in land, which wants sense, and which in regard of sense is inferior to brute beasts; and it would be less absurd to say, that beasts may be trusted, who have sense and want reason, than land, which wants sense and reason also should be trusted." But notwithstanding the force of this grave argument, the courts of equity in later times have said, that a trust shall never fail on account of the disability, or non-appointment, of the trustee, because

^a 1 Co. 127. a.

they

they hold, that the trust, if properly created, will fasten upon, and attach to, the land, intended to be made subject to it^b. The king^c, or a corporate body^d, may be a trustee; and where an estate was devised to the *separate use* of a feme covert, without the intervention of trustees, it was held, that the husband should be a trustee for his wife^e. So in a case^f, where a devise to a corporation (in trust) was determined to be void by the late statute of mortmain, the court decreed, that the heir at law of the devisor should be a trustee for the purposes of his will.

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his estate, and
office.

2. But though the courts now generally consider the trust as attaching upon the land itself, so as to convert all persons, seised of or acquiring the legal interest therein, into trustees, yet this rule has an exception in the case of a conveyance by a trustee for a

Of conveyances
by trustees.

^b See *Moggridge v.* 536. 2 Vern. 412.

Thackwell, 3 Bro. 517. ^c *Bennet v. Davis*, 2

^e *Kildare v. Eustace*, P. W. 316. 2 Vef. 665.

1 Vern. 439. 1 Vef. 453. ^f *Sonley v. Clock-*

3 Atk. 309. *maker's company*, 1 Bro.

^d 1 Vef. 467, 468. 81.

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valuable consideration to one, who has no notice of the trust^e. In this instance the purchaser shall not be affected by the trust. On the other hand *notice*, even where there is a valuable consideration^h, or the want of a valuable consideration, though there be no noticeⁱ, will in all cases render the legal feisin of the grantee subject to the performance of the trust; though he should afterwards levy a fine to strengthen his title^k. So a devisee of a trust estate shall hold it subject to the trusts^l; and if a trustee convey to one, who has no notice of the trust, and the grantee levy a fine, and five years pass, and afterwards the estate is repurchased by the trustee for a *bonâ fide* consideration; still he shall be a trustee, though his grantee was not^m. But a stranger, who purchases with notice from a person,

^e Snagg's case cited,
2 Freem. 43. pl. 47. 1
P. W. 278. 279.

^h Saunders v. Dehew,
2 Vern. 271. Langton
v. Astrey, 2 Cha. rep.
30. 3 Atk. 238.

ⁱ See 1 Co. 122. b.
Pye v. George, 2 Salk.

680.

^k 1 Vern. 149. 2 Atk.
631. 3 Atk. 563.

^l Marlow v. Smith,
2 P. W. 200.

^m Bovey v. Smith, 1
Vern. 60. 2 Cha. ca.
124. S. C.

who

who purchased for a valuable consideration without notice, may, I conceive, shelter himself under the first purchaser ⁿ.

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3. The rule, just alluded to, will be further exemplified by considering how the estate of the trustee is affected by his own acts or incumbrances. Before the statute of uses, we have seen, that the estate of the feoffees was subject to all the incidents, to which a real ownership was liable; owing to this very notion, that the use was annexed to the estate of the person seised of the legal interest, and not to the land itself; and therefore if *privity of estate* failed in the person, acquiring the legal seisin, there was an end of the use. Hence arose just complaints against uses, and their inconveniences. After the introduction of *trusts*, the courts of chancery knew, that if the same mischiefs attended the estate of the trustee, as that of the feoffees before the statute, trusts could not have been tolerated. They have therefore very wisely considered the trustee as having the legal ownership, so far only as to be

Of the incumbrances and forfeitures of the trustee at law.

ⁿ See *Lowther v. Carlton*, 2 Atk. 242. and the cases cited in the note of the last ed.

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his estate, and
office.

beneficial to cestuique trust, and not subject to any advantage or disadvantage, which may arise from the trustee personally, as being seised of the legal estate. Therefore if a trustee commit felony, though the lands are forfeited at *law*, yet cestuique trust may have relief in equity^e; and the same rule, I take it, holds, if the trustee commit treason^f; for as the *cestuique trust* forfeits his trust for *treason*, there is neither equity, nor reason, that the *trustee* should forfeit it for the same offence. So if a trustee die without an heir, though the lord by escheat is entitled to the lands at *law*, yet are they subject to the trust in equity^g. The estate of the trustee is not subject to dower^h; nor for the same reason is it to curtesyⁱ. So the estate of the trustee is not subject in *equity* to any of his debts, judgments, or incumbrances; however, it may be so at

^e Carter 67.

^f Pawlet v. Attorney General, Hard. 465. Sed. vide Lane 39. 54.

^g Eales v. England, Prec. ch. 200. 1 Eq. ab. 384. in notis. But this seems to be a very ques-

tionable point. See the arguments in Burges v. Wheate, cited ante.

^h Noel v. Jevon, 2 Freem. 43. 2 Vef. 634.

ⁱ Casborne v. Inglis, 7 Vin. ab. 157.

law;

law'; nor is it subject to his bankruptcy".

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office.

Of purchases by
the trustee.

4. As the courts of equity have been anxious to provide for the inconveniencies arising *at law* from the alienation, incumbrances, and forfeitures of the trustee, so they are extremely cautious in confirming purchases made by him of the trust estate. In the case of *Whelpdale v. Cookson*^x, where a trustee for the sale of land purchased part of the trust estate for himself, Lord Hardwicke declared, that he would not let the purchase stand good, although another person, being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence; nor was it enough for the trustee to say, you cannot prove any fraud, as it was in his own power to conceal it. We have already seen, that when a trustee renews a lease, of which he is trustee, the renewed lease shall be subject to the old trusts.

^t 1 P. W. 278. 1 Bro.
278.

^u See 2 P. W. 318.
3 P. W. 187. note A.

^x 1 Vef. 9. S. C. See
Twining v. Morice, 2
Bro. 326. *Fox v. Mac-*
reath, *ibid.* 400.

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Of the trustee,
his estate, and
office.

Of suits by the
trustee.

5. As the legal interest of trust funds is vested in the trustee, he is consequently a necessary party to all suits commenced for and against the trust property. Generally indeed the cestuique trust should be also made a party^y; though the trustee may not only sue in his own name^z, but in some instances he should not bring his cestuique trust before the court on pain of incurring costs^a.

Whether he
may release or
compound a
debt.

6. It is, generally speaking, a rule, that a trustee releasing or compounding a debt, due to the trust estate, must answer for the loss occasioned by such release or composition^b. Yet this rule must always depend upon the particular circumstances of the case; for where a trustee, in releasing or compounding a debt, acts from prudential motives, and with a view to benefit the trust property, the courts will consider his conduct not only excusable, but in many instances laudable^c.

^y 1 Har. Cha. pract.
247.

^z Ibid. Toth. 285.

^a 2 Atk. 48.

^b See Jevon v. Bush,

1 Vern. 342. Gorge v.
Chansey, 1 Cha. rep.
125.

^c Blue v. Marshall, 3
P. W. 381.

On the other hand, where a trustee buys in an incumbrance for less money, than is actually due, the trust estate shall receive the benefit of the composition ^d.

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office.

7. A trustee cannot (without an express power for that purpose) alter the nature of the trust property^e, either by converting land into money, investing money in the purchase of land^f, or by taking a lease for lives instead of renewing a lease for years^g, so as to vary the right of succession to such property; unless it be under particular circumstances, and evidently for the benefit of the trust estate^h.

He cannot alter
the nature of
the trust pro-
perty.

8. As the trustee cannot prejudice cestuique trust by *doing* what his trust does not authorize him to do, so he cannot, in general, injure him by *omitting* to do, what his office requires

His laches will
not prejudice
cestuique trust.

^d 3 P. W. 251. note
A. Darcy v. Hall, 1
Vern. 49. Morret v.
Paske, 2 Atk. 54.

^e See Earlom v. Saunders, Amb. 241.

^f Rook v. Warth, 1
Ves. 461. Tullit v. Tullit,

Amb. 370.

^g Witter v. Witter, 3
P. W. 99.

^h Terry v. Terry,
Prec. Cha. 273. Vernon
v. Vernon cited, 3 Bro.
513. Inwood v. Twine,
Amb. 417.

him

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office.

him to perform¹. Therefore where an entry was made and a fine levied by a stranger during the infancy of cestuique trust, and the trustee neglected to enter for the purpose of avoiding the fine, the court of chancery determined, that the infant should not suffer for the laches of his trustee^k. The exception to this rule is in the case of a purchaser or creditor^l.

He cannot vary
securities with-
out an express
power.

9. When money is invested in the purchase of stock in the names of trustees, they have no power to change the security, unless they are expressly allowed so to do by the trust; and therefore, if they take upon themselves to use a discretionary power in this respect, they are liable to answer for any loss, which may happen to the trust fund; it being in the election of the cestuique trust, either to have the individual stock restored to him, or else the money for which it was sold by the trustees^m. But while the original stock remains vested in their names, or if they pur-

¹ 3 P. W. 215. 2 Atk. 406.

310. ante. 207.

^k Allen v. Sayer, 2 Vern. 368.

^m Harrison v. Harrison, 2 Atk. 121. Bostock v. Blakeney, 2 Bro. 653.

^l Note G. 3 P. W.

chase

chafe any other stock in pursuance of a power reserved to them, they will not be answerable for the falling of such original stock in the one instance, nor of the new fund in the otherⁿ. But here observe, that when there is a decay of the trust funds, all the *cestuique trust* must suffer equally; and therefore if the trustee in that case shews any preference, he must answer for it out of his own estate^o. In a case^p, when a power was given to trustees to invest monies in *government funds, or other good securities*, it was said by Lord Hardwicke, that neither south sea stock nor bank stock were considered as a *good security*, because it depended upon the management of the governors and directors, and was subject to losses; but that it was different as to south sea and bank *annuities*.

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office.

10. A trustee is sometimes liable to a breach of trust, though he should act up to the strict letter of his trust. Therefore where a trust was created by will for the *maintenance* of infants, and the trustee in the lifetime of

When guilty of
a breach of trust,
though he act
conformable to
the letter of his
trust.

ⁿ Jackson v. Jackson,
1 Atk. 513. Anon. 1 P.
W. 648.

^o Tinsley v. Throck-

morton, 2 Cha. ca. 132.

^p Trafford v. Boehm,
3 Atk. 444.

the

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the father applied the interest of the trust funds for that purpose, Lord Thurlow said, that it was contrary to all rules, that the interest vested in the children should be applied to their maintenance in the lifetime of the parent, for that would amount to a gift to the parent of so much as should be necessary for the maintenance¹. This rule applies only to cases, when the parent has the ability to provide for his children². But then again, a trustee may in some instances exceed the letter, if he conform to the spirit of the trust. Thus in a case³, where a trustee of money for an infant payable at 21 or marriage, with a power of *maintenance* in the mean time, paid part of the *principal* for placing the infant out as an apprentice; the court upon the death of the infant under 21 unmarried, allowed the trustee what he had so paid, notwithstanding the money was limited over upon the event, which had happened. I may here also add the case⁴,

¹ Andrews v. Partington, 3 Bro. 60.

² See Butler v. Butler, 3 Atk. 60. and the note to the last ed.

³ Franklin v. Green,

² Vern 137. See *Cont. Swinnock v. Crisp*, 2 Freem. 78.

⁴ Gosselin v. Dodwell, cited 3 Atk. 414.

where a sum of money was directed to be laid out in the purchase of *freehold* lands only, and the court dispensed with the strict direction, and approved of the purchase of *copyhold* lands at the same time with the freehold. The court seemed inclined to act in the same manner, where money was directed to be laid out in the purchase of land *within a particular district* ^u.

SECT. VII.

Of the trustee, his estate, and office.

II. Against accidental losses, which happen to the trust estate, the courts are anxious to relieve the trustee; if such losses do not happen through his own neglect or default. Is the trustee robbed of the trust money? the courts consider, whether he has kept it, as he would his own money ^x. Does his banker fail, whereby a loss accrues to the trust fund? equity enquires, whether the banker was in credit, at the time the money was paid into his hands ^y. Does an agent of the trustee become insolvent? the question is, whe-

When liable to accidental losses.

^u Maynwaring v. Maynwaring, 3 Atk. 413.

^x Morley v. Morley, 2 Cha. ca. 2. Jones v. Lewis, 2 Vef. 240.

^y Knight v. Plimouth,

3 Atk. 480. Horsley v. Chaloner, 2 Vef. 85. Ex parte Belchier, Ambl. 219. Cont. Rider v. Bickerston, 5 Ba. ab. 401. pl. 12.

ther

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Of the trustee,
his estate, and
office.

Of trustees to
preserve contin-
gent remainders.

ther he was in good circumstances at the time of his nomination ^z.

12. When trustees are appointed to preserve contingent remainders, if they join in any conveyance in order to destroy those remainders, this shall in general be deemed a breach of trust ^a; whether the settlement be voluntary, or not ^b. In some instances, however, the courts have decreed them to make conveyances in order to defeat the contingent estates ^c; but these have been very particular cases. It would therefore be always prudent for trustees to receive the directions of a court of equity, before they agree to destroy those estates, which they were appointed to preserve.

Trustee may
concur with cestui-
que trust in
tail to bar the
intail.

13. But whenever cestuique trust is entitled to an estate *tail*, which he alone might have barred by an equitable recovery: then

^z 12 Mod. 560.

^a Pye v. George, 2 Salk. 680. 1 P. W. 128. S. C. Elfe v. Osborn, 1 P. W. 388. Woodhouse v. Hoskins, 3 Atk. 22.

^b Mansell v. Mansell, 2

P. W. 678. Symance v. Tattam, 1 Atk. 613.

^c See Basset v. Clapham, 1 P. W. 358. Winnington v. Foley, *ibid.* 536. Platt v. Sprigg, 2 Vern. 303.

it will not be a breach of trust, if the trustee join with cestuique trust in any conveyance to bar the intail and to pass a legal estate; for his joining in this case is nothing more, than what he is compellable to do^d.

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14. It is said to be a rule in chancery, that if lands are vested in trustees in fee, in trust for one, and the heirs of *his body*, with *remainder* over; the trustees are not to convey an estate in fee to the tenant in tail, but an estate tail; though such tenant in tail will have it in his power to bar the entail, with the remainder over, by a recovery^e. So if a sum of money be articulated to be laid out in land, and the lands to be settled in tail, with remainders over; the settlement shall be made accordingly, and the money shall not be paid to the tenant in tail; because there is a chance of his death before a recovery could be suffered, which can only be done in term time^f. But if the remainder in fee had in this case been limited to the tenant in tail, then it seems, that the money

The trustee is not to convey a fee simple to cestuique trust in tail.

^d See 1 Eq. ab. 384. (E.) note a.

^e 1 Eq. ab. 395.

^f Short v. Wood, 1

P. W. 470. and the cases cited in note 1. to Collett v. Collett, 1 Atk. 12. 3d ed.

should

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office.

should have been paid to him; because he might have barred the limitation by a fine, which may be levied in vacation time, as well as in term^s.

Of allowances to
trustees for their
care.

15. The courts of equity look upon trusts as *honorary*, and not undertaken upon mercenary motives^h; and therefore in the case of *Robinson v. Pett*ⁱ, Lord Talbot said, it was an established rule, that a trustee should have no allowance for his care and trouble in the management of the trust; for if on those pretences, allowances were to be made, the trust estate might be loaded and rendered of little value; that besides great difficulty might attend in settling and adjusting the *quantum* of such allowance, especially as one man's time might be more valuable than that of another; and in that respect it could be no hardship upon any trustee; for it was at his option either to accept or refuse the trust. But if a trustee come in a fair and open manner, and tell cestuique trust, that he will not act in such a trouble-

^g See cases *supra*.

^h 2 Atk. 60. 406.

ⁱ P. W. 251. See

French v. Bacon, 2 Atk.

120. note 3. In the mat-

ter of *Annesley*, Amb. 78.

some

some and burthensome office without further compensation given by cestuique trust, over and above the terms of the trust, and such compensation be contracted for between them, this contract, Lord Hardwicke observed^k, would not perhaps be set aside, though there was no precedent, wherein such a bargain had been confirmed.

SECT. VII.

Of the trustee, his estate, and office.

But though a trustee be not himself allowed for his trouble, yet it seems, that if he employ a bailiff to manage the trust estate, he must be allowed for the employment of, and payments made to, such bailiff^l.

16. Though trustees are not allowed any thing for their trouble and care in the management of the trust estate, yet it is but reasonable, that they should be allowed all *costs, damages, and expences*, which may be incurred in the execution of the trust, and discharge of their office; provided there be no mismanagement nor breach of trust^m.

Of allowances for costs and expences incurred by the trustee.

^k 2 Atk. 60.

^l Bonithon v. Hockmore, 1 Vern. 316.

^m Hetherfel v. Hales,

2 Cha. rep. 158. and Finch rep. 361. 12 Mod. 560. 2 Cha. ca. 138.

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Therefore, Lord King said ⁿ, it was a rule, that a trustee ought to be saved harmless by cestuique trust, as to all damages relating to the trust. Thus, where a trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the cestuique trust was discharged from being liable to pay a greater sum, or from a plain and great hazard of being so, the trustee ought to be repaid ^o.

Where a breach
of trust shall fall
upon the estate
of cestuique
trust.

17. If a trustee, said Lord Hardwicke ^p, err in the management, and be guilty of a breach of trust, yet if he quit it with the approbation of cestuique trust, the breach ought in the first place to fall upon the estate of cestuique trust, who consented to it; for the courts are ever anxious to deliver the trustee from any misapplication of the trust money.

Trustee charge-
able only for
what he has ac-
tually received.

And lastly. Where there are two or more trustees, the rule is, that each of them shall be charged for his own wilful neglect, default, or breach of trust only; and that the

ⁿ 2 P. W. 455.

ibid. 453.

^o Balsh v. Hyham,

^p 3 Atk. 444.

innocent trustee shall not suffer for the misconduct of his co-trustee. Therefore it has been decided, that a trustee, who has joined in a voucher for the whole of trust money, but has in truth only received a part of it, shall be charged for so much only as has actually come to his hands^q; unless indeed fraud, or what is tantamount to it, gross negligence, should appear in the transaction^r.

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^q See Leigh v. Barry,
3 Atk. 584. and note 2.
last ed.

^r Bridgm. 38. Keble v.
Thompson, 3 Bro. 112.

A P P E N D I X.

A P P E N D I X, N^o 1.

Appendix, No. 1.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that if the manor of and hereditaments in the county of mentioned and comprised in the settlement made in consideration of, and previously to the marriage of A. B. bearing date, &c. and thereby limited and settled upon or to the use of him the said A. B. for life, shall at any time, by or under the uses and limitations in the same settlement contained, descend or come for an estate tail in possession to, or upon, the elder or any other son of the said C. D. on the body of the said E. F. begotten, born in the lifetime of the said C. D. or in due time after his decease, or to or upon the issue male of such elder or other son, so as to be in the actual possession or receipt of the rents and profits thereof, and there shall be living any other son of the

body of the said C. D. on the body of the
 said E. F. begotten, than the son to or upon
 whom, or upon whose issue male, such estate
 shall come or descend, or any heirs male of
 the body of such other son, then and in that
 case, and so often as the same shall happen,
 the use or uses hereinbefore limited to or for
 the benefit of such son, or his issue male,
 upon whom such manor and hereditaments,
 in the county of shall descend
 or devolve for an estate tail in possession as
 aforesaid, and his or their issue male, of and
 in all and singular the hereditaments herein-
 before granted and released, or intended so
 to be respectively as aforesaid, shall cease,
 determine, and become void, as if such son or
 issue male was or were actually dead without
 issue male of his or their body or bodies; and
 then and thenceforth the same hereditaments
 hereby granted and released shall immediately
 go and remain to the use of such person and
 persons, as by virtue of the limitations here-
 inbefore contained would then be entitled,
 as the person or persons next in remainder,
 to the same hereditaments, in case such son
 or issue male, so becoming entitled to the
 said manor of and hereditaments,
 in the county of as aforesaid,

Appendix, No. 1. was or were then dead without issue male of his or their body or bodies; and the same person or persons shall in every such case be entitled to take the same estate and estates in the said hereditaments hereby granted and released, as he or they would have been entitled to take therein by virtue of these presents, if such son, or issue male, so becoming entitled to the said manor and hereditaments, in the county of
was or were actually dead without issue male as aforesaid.

APPENDIX, N° 2.

Appendix, No 2.

Power of leasing.

Provided always, and it is hereby agreed and declared, that it shall and may be lawful to and for the said A. B. and C. D. from time to time, during their joint lives, and the survivor of them during his or her life, and from and after the decease of such survivor, then to and for the guardian or guardians for the time being of any child or children of the said A. B. on the body of the said C. D. to be begotten, who by virtue of, or under the limitations hereinbefore contained, shall be entitled to the actual freehold or inheritance of the hereditaments and premises

premises hereby granted and released, or intended so to be, from time to time, during the minority or nonage of such child or children respectively, by any indenture or indentures to be sealed and delivered by them, him, or her respectively, in the presence of and to be attested by two or more credible witnesses, to demise or lease all or any part or parts of the said hereditaments and premises hereby granted and released, or intended so to be, with the appurtenances, to any person or persons, for any term or number of years not exceeding twenty-one years in possession, and not in reversion or by way of future interest; so as that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and to be incident to, the immediate reversion of the premises so to be leased, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or any thing in the nature or in lieu of a fine, premium, or foregift, for the making thereof; and so as that in every such lease there be contained a condition of re-entry on non-payment of the rent or rents to be thereon or thereby re-

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Power of leasing.

spectively reserved, by the space of twenty-one days next after the same shall become due and payable; and so as that the lessee or the respective lessees to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts of such lease or leases; and so as that none of the lessees, to whom any such lease or leases shall be made, be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for committing waste; any thing herein contained to the contrary thereof notwithstanding.

A P P E N D I X, N° 3.

Appendix, No. 3.

Power of selling
and exchanging.

Provided always, and it is hereby declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, and they and he are hereby authorized and empowered, at any time or times hereafter, at the request and by the direction of the said E. E. and I. T. during their joint lives, and after the decease of either of them then at the request and by the direction of him or her surviving, during

ing his or her life (such request and direction to be testified by some writing or writings under the hands and seals or hand and seal of the said E. E. and I. T. or of the survivor of them, and to be attested by two or more credible witnesses) to make sale, alien, and dispose of, or to convey in exchange for or in lieu of other messuages, lands and hereditaments, to be situate somewhere in that part of Great Britain called England, all or any part of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-simple, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or for such equivalent or recompence in messuages, lands, or hereditaments, as to them the said B. B. and C. C. or the survivor of them, or his heirs, shall seem reasonable; and for the intents and purposes aforesaid, or any of them, it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, at such request, and with such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, to be by them the said B. B. and C. C. or the survivor

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and exchanging.**

survivor of them, or his heirs, signed, sealed, and delivered in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, limitations, powers, provisos, and agreements, hereinbefore created, expressed, declared, and contained, of and concerning the hereditaments so to be sold, or exchanged, or any part thereof; and by the same, or any other deed or deeds, writing or writings, to be by him or them signed, sealed, and delivered, and attested as aforesaid, to limit and appoint, direct and declare, such use or uses, estate or estates, trust or trusts, of the hereditaments, the uses whereof shall be so revoked, which it shall be thought necessary or expedient to limit, declare, or appoint, in order to effect such sale, exchange, or disposition as aforesaid; and that upon any such exchange as aforesaid, it shall and may be lawful for the said B. B. and C. C. or the survivor of them, or his heirs, to receive or take any sum or sums of money by way of equality of exchange; and also upon payment of any money to arise by such sale of the said hereditaments, or any part thereof, or any money to be received or taken for, or by way of, equality of exchange, it shall and may be lawful

lawful to and for the said B. B. and C. C. or the survivor of them, or his heirs, to give and sign receipts for the money, for which the same shall be so fold, or so to be paid for equality of exchange; which receipts shall be sufficient discharges to the person or persons paying the same respectively, for the money for which the same shall be so given, or for so much thereof as in such receipts shall be respectively acknowledged or expressed to be received; and that the person or persons paying the same respectively, and taking such receipt or receipts for the same as aforesaid, shall not afterwards be obliged to see to the application, or be in anywise answerable or accountable for any loss, misapplication, or nonapplication of such money, or any part thereof^a. Provided neverthe-

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and exchanging.

^a It is usual to introduce a clause in this place declaring, that, upon sale or exchange, the estates so fold, or exchanged, shall be discharged of the uses of the settlement; and that the releasees shall thenceforth stand seised to the use of the purchaser. But this clause seems to be altogether useless: for the appointment under the power must necessarily

discharge the estates of the former uses. Besides, as the uses under the appointment may be limited, so as to provide for a variety of circumstances, there is an impropriety in declaring, that the releasees in the original settlement shall stand seised to the use of the purchaser, or the person to whom the estate shall be conveyed, and his heirs.

less,

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less, and it is hereby also declared and agreed by and between the said parties hereto, that when all or any part or parcel of the said hereditaments, hereby made saleable as aforesaid, shall be sold in pursuance of these presents for a valuable consideration in money, and also when any sum or sums of money shall be received for equality of exchange in pursuance of the power hereinbefore contained; then they the said B. B. and C. C. or the survivor of them, or his heirs, shall with all convenient speed (with the consent of the said E. E. and I. T. during their joint lives, or of the survivor of them during his or her life, to be testified by writing under their, his, or her hands or hand, and after the decease of such survivor, then with the consent in writing of the person or persons, who would, under or by virtue of the limitations hereinbefore contained, or to be contained or referred to in the settlement or conveyance hereinafter directed, or any of them, be for the time being in the actual possession, or entitled to the receipt of the rents and profits of the hereditaments to be purchased as hereinafter is mentioned or directed, in case the same were then actually purchased, if such person or persons be of full

full age, but if not then with the consent in writing of the guardian or guardians for the time being of such person or persons respectively) lay out and invest all and every the sum and sums of money, which shall arise by such sale or sales, and be paid for equality of exchange as aforesaid, in the purchase of other messuages, lands, and hereditaments in possession, to be situate, being, or arising somewhere in that part of Great Britain called England, of a clear and indefeasible estate of inheritance in fee simple (whereof any part, not exceeding one fourth part in any one purchase, may, if the parties interested shall think fit, be copyhold of inheritance); and as well the hereditaments so to be purchased, as all and every the hereditaments so to be received in exchange as aforesaid, shall thereafter forthwith be settled, conveyed, and assured to such uses, upon such trusts, and to and for such and the same ends, intents, and purposes, and with, under, and subject to the same powers, provisos, conditions, and agreements, as are in and by these presents limited, expressed, declared, and contained, of and concerning the hereditaments hereby granted and released, or intended so to be, or as near thereto
as

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as the death of parties, and other contingencies, or the circumstances of the case, will then permit. Provided always, and it is hereby further declared and agreed by and between the said parties to these presents, that in the meantime and until the money to arise by such sale or sales, or to be received for equality of exchange as aforesaid, shall be laid out and invested in a purchase or purchases in the manner hereinbefore mentioned, it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said E. E. and I. T. or of the survivor of them, to be testified as last mentioned, and from and after the decease of such survivor, then by and of the proper authority of the said trustees or trustee for the time being, from time to time to place out and invest such sum or sums of money in the public stocks or funds, or at interest upon government or real securities; and from time to time, with such consent and approbation, and so testified as aforesaid, or of their or his own proper authority, as the case shall happen, to alter, vary, sell, transfer, and dispose of such stocks, funds, or securities, and lay out
and

and invest the money arising by such alteration, sale, transfer, or disposition again, upon new or other stocks or funds, or at interest upon government or real securities of the like nature, as often as they shall think proper; and the interest, dividends, and annual proceeds arising from such stocks, funds, or securities, shall from time to time go and be paid to such person or persons, and be applied to such uses, intents, and purposes, and in such manner as the rents and profits of the hereditaments, to be purchased therewith, would go and be payable, or applicable, in case such purchase or purchases were actually made.

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END OF THE FIRST VOLUME.

